137-60

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 330. 42

CATHERINE FISHBURN, PLAINTIFF IN ERROR,

vs.

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

FILED JUNE 3, 1887.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the western district of Wisconsin, Greeting:

Because in the record and proceedings and also in the rendition of a judgment of a plea which is in the said circuit court, before you, between Catherine Fishburn and The Chicago, Milwaukee and St. Paul Railway Company, a manifest error has intervened, to the great damage of the said Catherine Fishburn, as by her complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to all the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, A. D. 1887, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States shall be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of Madison, this 16th day of February, A. D. 1887, and of our Independence the one hundred and eleventh.

Seal U. S. Circuit Court, Western Dist. of Wisconsin.

F. M. STEWART,
Clerk U. S. Circuit Court, West'n Dist. of Wis.

2 The return of the judges of the circuit court of the United States for the Western district of Wisconsin appears by the schedule hereto annexed.

Witness my hand and the seal of said court, at my office, in the city of Madison, in said western district of Wisconsin, this 20th day of May, in the year of our Lord one thousand eight hundred and eighty-seven, and of our Independence the one hundred and eleventh.

Seal U. S. Circuit Court, Western Dist. of Wisconsin.

F. M. STEWART, *Clerk.*

3 UNITED STATES OF AMERICA, *Western District of Wisconsin,* } *ss:*

At a special term of the circuit court of the United States of America within and for the western district of Wisconsin, begun and held, according to law, at the United States court-room, in the city of Madison, in said district, on the first Tuesday (being the first day) of December, A. D. 1885—present and presiding, the Hon. Romanzo Bunn, district judge—among other the following proceedings were had, to wit:

CATHERINE FISHBURNE, Plaintiff,
against
THE CHICAGO, MILWAUKEE AND SAINT PAUL RAILWAY COMPANY, Defendant.

Be it remembered that at this said term of court, to wit, on the said 1st day of December, A. D. 1886, the following order was made and entered by said court in the above-entitled case, to wit:

Order Docketing Cause.

CATHERINE FISHBURNE, Plaintiff,
against
THE CHICAGO, MILWAUKEE & SAINT PAUL RAILWAY COMPANY, Defendant.

4 This day came the defendant, by its attorneys, and filed in this court a record of proceedings in this cause in the circuit court of the State of Wisconsin for Green county, and moved that this cause be docketed and proceeded with as provided in the act of Congress of March 3, 1875, in relation to removal of cases from the State courts; and the court being sufficiently advised of and concerning its opinion thereof, it is ordered that the said motion be, and the same is hereby, granted, and that this cause be docketed in this court, to be proceeded with in all respects as though originally commenced here.

And which said transcript of record was and is in the words and figures following, to wit:

Transcript of Record.

Circuit Court, Green County.

CATHERINE FISHBURN, Plaintiff,
versus
CHICAGO, MILWAUKEE AND SAINT PAUL RAILROAD COMPANY, Defendant.

The State of Wisconsin to the said defendant- and each of them:

5 You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend the above-entitled action in the court aforesaid, and in case of your failure so to do judgment will be rendered against you according to the demand of the complaint, of which a copy is herewith served upon you.

B. DUNWIDDIE,
Plaintiff's Attorney.

P. O. address: Monroe, Green county, Wisconsin.

STATE OF WISCONSIN, } ss:
County of Green, }

Circuit Court, Green County.

CATHERINE FISHBURN, Pl'ff,
vs.
THE CHICAGO, MILWAUKEE AND ST. PAUL RAILROAD COMPANY, Def't.

The plaintiff states and shows unto this court—

1. That the defendant was on the 24th of July, A. D. 1884, and from thence hitherto and now is a railroad corporation owning and operating a railroad from the city of Chicago, in the State of Illinois, by way of the cities of Milwaukee and La Crosse, in the State of Wisconsin, and thence westerly through the southern part of the State of Minnesota (under the corporate name of the Chicago, Milwaukee and St. Paul Railroad Company), having many other branches and subdivisions, one of which connects the said railroad of the city of Milwaukee, running thence westerly by the way
6 of Milton and the city of Janesville, in the county of Rock, to the city of Monroe, in the county of Green, in the State of Wisconsin, duly incorporated under the laws of the State of Wisconsin under the name aforesaid.

2. That on the 24th day of July, A. D. 1884, this plaintiff, on the morning of said day, was at the station of said railway in Pipestone county, in Southern Minnesota, intending to start on said day to the city of Chicago, in the State of Illinois, but, having a daughter residing at Edgerton, in said county of Pipestone, and this plaintiff desiring to stop at Edgerton aforesaid, purchased a ticket at Pipestone, in said county of Pipestone, to Edgerton aforesaid, and boarded a train for Edgerton; and this plaintiff, after boarding said train, decided that if she could purchase a ticket at Edgerton aforesaid to Chicago aforesaid and proceed on that train she would do so, and for that purpose this plaintiff spoke to the conductor of that train of and respecting her said intentions and asked him if he would hold the train at Edgerton until the plaintiff would have time and opportunity to purchase a ticket of the ticket agent at Edgerton from the said Edgerton to the city of Chicago aforesaid, in the State of Illinois, and the conductor agreed to hold the train and aid the plaintiff in purchasing the said ticket, and the said train arrived at Edgerton aforesaid between the hours of three and four o'clock in the afternoon of said day. This plaintiff got off the said train, and the conductor of said train went in company of this plaintiff to the ticket office of the defendant at Edgerton, station of the defendants, and asked the
7 ticket agent to sell this plaintiff a ticket from Edgerton aforesaid to Chicago aforesaid on said train, and the said agent got his ticket on said road and held it in his hand and stated the price of said ticket, which was twelve dollars and fifty cents. This plaintiff, not having the change, gave th- said agent a twenty-dollar bill. The said conductor stood by and saw this plaintiff hand the said agent the said bill. The said agent took the said twenty-dollar bill

and gave this plaintiff some change in currency and silver, which this plaintiff took in her hand. While this plaintiff was in the act of taking the change the said conductor called out, "All aboard," and this plaintiff, thinking she had received the ticket with the change, held the change in her hand, thinking the ticket was with it, and walked hurriedly to the train, having no time to count the change or to examine whether the ticket was within the bills and change, and on boarding the train thrust the bills and change into the pocket of her dress, supposing the ticket was with the change, and the conductor boarded the train at the same time with the plaintiff.

3. And this plaintiff further shows unto this court that east of Edgerton aforesaid there is a large stream of water or creek. The defendant's railway crosses it on a high bridge and trestle-work, which is about twenty-five feet above the water and about seventy-
five feet long, and after crossing said creek on said trestle-
8 work the track turns and runs east and follows the bank of
the creek three or four miles, with high embankment on one side of the road and steep slope on the other for a long distance, so that after crossing said creek on said trestle-work there is no way of returning to Edgerton aforesaid only by going back over the trestle-work and bridge or travelling east on said railway track until reaching a highway crossing the railroad track at right angles and then following the highway north or south to an intersecting road running east and west, which runs into Edgerton aforesaid, and to go east to said highway plaintiff would have to travel about four miles; that the said trestle-work was about one-half a mile east of said Edgerton station.

4. This plaintiff shows unto said court that after boarding said train and said train had proceeded eastward from said Edgerton aforesaid and toward said trestle bridge the said conductor called on this plaintiff for her ticket, and this plaintiff then searched for her ticket and, after making a careful search, found she did not have said ticket, and so informed the said conductor. The said conductor then, with rude and ungentlemanly language, spoke to this plaintiff and said she must get off the train and go back and hunt her ticket, and the conductor pulled the bell-rope of the train. The train slacked up, but ran on until it reached the east end of the trestle bridge, when the train stopped. The conductor seized this plaintiff in a violent and ungentlemanly manner by her shoulder, ordered her to get
her baggage, and get off the train, and this plaintiff gathered
9 up her baggage, and the said conductor forcibly put this
plaintiff off the train. This plaintiff had friends on said train—two or three friends—gentlemen who were acquainted with this plaintiff. When the plaintiff got off the train they protested to the conductor and wanted this plaintiff to get back on the train, and offered to pay her fare, and the said conductor, in an excited manner, *used* language showing that he was under great excitement, replied, "No; she has lost her ticket; let her go back and find it." This was about four o'clock in the afternoon of said day, the weather being exceedingly hot and the sun shining brightly, the plaintiff's

baggage consisting of a satchel, a basket, a shawl, strapped, a parasol, and a gossamer, altogether weighing about fifty pounds. This plaintiff, not knowing what to do, decided that the best thing she could do was to walk back to Edgerton aforesaid and carry her baggage, which she was compelled to do, walking back over the high trestle bridge, compelled to step across ties as a means of crossing, and did so cross over said bridge and carry her baggage. This plaintiff was at that time about the age of forty-nine years, and was not at that time in good health, but was afflicted by nervous weakness—rheumatism—and this plaintiff's general condition was that of nervous debility.

And this plaintiff further shows that, by reason of being so put off of the said train, and by reason of the extreme mortification and wounded feelings acting on the nervous system of this plaintiff,
10 and being so overburdened by carrying the said baggage over the said bridge and trestle in the hot sun, — gave way and sank down upon the ground through exhaustion and weakness, and had to wait a considerable time before this plaintiff recovered to go on; then, gaining strength, this plaintiff walked back to the defendant's station at Edgerton aforesaid, a distance of about half a mile, and went to the station agent aforesaid and informed him that this plaintiff had been put off the train because she did not have her ticket, and the said agent replied in positive terms that he had given this plaintiff —, and that she had lost it; nevertheless, the plaintiff, having a daughter in said Edgerton, went to her daughter's to stay, and informed the said agent where she was stopping, and on the next day about ten o'clock the said ticket agent came to the residence of this plaintiff's daughter and informed this plaintiff that he had found the ticket, and that he had put it in the safe with the money by mistake, and offered them to refund the money or to issue a new ticket. Although the said agent offered this plaintiff a new ticket as aforesaid, yet this plaintiff was wholly unable to accept of this offer, but was so prostrated and so weak and so exhausted and so debilitated by reason of this plaintiff's being compelled to walk back on the track aforesaid this plaintiff became sick, and was compelled to remain over at the said daughter's, in the said Edgerton, during the days of the 25th, 26th, 27th, & 28th of July aforesaid and could not proceed on her journey, by reason whereof this plaintiff was damaged in the sum of ten thousand (10,000) dollars.

11 Wherefore this plaintiff demands judgment against the defendant for the sum of ten thousand dollars besides the costs of this action.

B. DUNWIDDIE,
Pl'ff's Att'y, Monroe, Wis.

Endorsed: Circuit court, Green county. Catherine Fishburn, p'l'ff, *vs.* Chicago, Milwaukee & St. Paul Railroad Company, d'f't. Complaint. Filed Aug. 28, 1885. Theo. W. Goldin, clerk circuit court, Green county, Wis. B. Dunwiddie, p'l'ff's att'y, Monroe, Wis.

Int. 6. How far east of said Edgerton station did the passenger and freight trains on said railroad run in the months of July and August, A. D. 1884?

Ans. I don't know.

Int. 7. To what points east of said Edgerton station did the company operate said road—carry freights and passengers—during the months of July and August, A. D. 1884?

Ans. I had travelled those months as far as Ramsey, Minnesota.

Int. 8. Were you on one of the defendant's passenger trains going east on the 24th day of July, A. D. 1884—on or (A. D. Kingsbury) about said time—when the plaintiff, Catherine Fishburn, was also on the same train, passing and going east of said Edgerton station?

Ans. Yes.

Int. 9. Was said train stopped a short distance east of said Edgerton station; and, if so, did anything occur to the plaintiff at the time said train stopped? And, if so, state what did occur to her—state fully.

Ans. The train was stopped. Just when the train stopped I heard some talk in the car ahead of the one I was in. I got up and walked ahead. The conductor stood on the platform, and I saw Mrs. Fishburn on the ground. I also saw Mr. Pickett and Mr. Ask, of Edgerton, there, and I think there was a brake-
17 man there. That is all I recollect of seeing.

Int. 10. Did you have any conversation with Mrs. Fishburn, the plaintiff, at the time of the said occurrence, in the presence and hearing of the conductor of said train? And, if so, state fully all that was said by yourself to Mrs. Fishburn and said conductor with reference to said occurrence.

(Objected to by defendant as incompetent, immaterial, and irrelevant, and further objected to because no foundation has been laid for the question, and because the evidence sought to be introduced is hearsay.)

Ans. I told Mrs. Fishburn to come back and I would pay her fare.

(Objected to.)

I asked the conductor why he had put her off. I told him that I would pay her fare. I think that was all I said to the conductor.

Int. 11. Now, please state what Mrs. Fishburn said to you and what the conductor said at the time of said occurrence. (A. D. Kingsbury.)

(Objected to as incompetent, immaterial, and irrelevant.)

Ans. Mrs. Fishburn did not say anything. The conductor said that she had lost her ticket, and let her go back and hunt it; that he was not going to keep the train there all day waiting for her. That was all I heard said or recollect.

Int. 12. If you did not engage in the conversation at the time of said occurrence did you hear any conversation at the time of the said occurrence with others in the presence and hearing of said con-

ductor, or did you hear the conductor say anything in refer-
18 ence to said occurrence at the time thereof?

(Objected to by defendant as incompetent, irrelevant, and immaterial.)

Ans. Mr. Ask and Mr. Pickett both offered to pay her fare. I do not remember anything further that was said.

Int. 13. Now, look upon the paper marked "Exhibit A" and say if it is substantially a correct outline sketch or map of said Edgerton station and the railroad east of said station to where said occurrence happened.

(Objected to by defendant as incompetent, irrelevant, and immaterial.)

Ans. Yes; that is something like it.

Int. 14. Is the plan on said map marked "Exhibit A" substantially correct as the plan of said occurrence?

(Same objection by def't.)

Ans. Yes.

Int. 15. What kind of a path was it from where plaintiff, Mrs. Fishburn, left the train back to Edgerton, and over (A. D. Kingsbury) what did she have to travel to get back to Edgerton? State fully and particularly.

(Same objection by defendant.)

Ans. There was no path, and if she followed the railroad she would have to walk on the railroad, and have to walk over a trestle bridge of the railroad.

Int. 16. What kind of a day was it, as to temperature and as to its being clear or cloudy, at the time the plaintiff walked back to Edgerton station the said 24th day of July, A. D. 1884?

Ans. It was a clear warm day.

19 Int. 17. Is there a bridge over which said railroad passes between said Edgerton station and the place where said occurrence happened on said road? If so, give a description of the same, as near as you can, stating its height, length, and width.

(Same objection by defendant.)

Ans. There is a bridge there. Its height is between 10 and 20 feet, and its length is about 100 feet long, I should judge. I do not know its width, but suppose it is the width of all railroad bridges.

Int. 18. Was said bridge there at the time of the said occurrence, and by what means could a foot passenger pass over said bridge and on what would he have to walk?

(Same objection by def't.)

Ans. He would have to walk on the ties. The bridge was then there.

Int. 19. What was the condition of the said conductor at the time of the said occurrence, in his manners and mode of acting? (A. D. Kingsbury.)

Same objection by defendant.

Ans. The conductor seemed to be rather out of humor. I noticed nothing else.

Cross-examination:

C. Int. 1. Did you see the plaintiff in the train prior to the time you saw her on the platform of the car forward of the one in which you were?

(Objected to as incompetent, irrelevant, and immaterial by the plaintiff.)

Ans. I did not see her on the platform. The first I saw of her was on the ground.

20 C. Int. 2. Did you hear any conversation between her and the conductor before the time you came out on the platform and saw her on the ground?

(Same objection by pl't'ff.)

Ans. I heard talk, but don't know what it was about.

C. Int. 3. Did you hear any conversation regarding the cause of her coming out of the car, before you saw her on the ground, between the conductor and the plaintiff?

(Same objection by pl'ff.)

Ans. No.

C. Int. 4. Did you know at the time or do you know now, of your own knowledge, aside from anything that you have heard, what the trouble was?

(Same objection by pl'ff.)

Ans. No.

C. Int. 5. Where did plaintiff get aboard the train?

Ans. I think I saw her get on the train at Edgerton? (A. D. Kingsbury.)

C. Int. 6. Were you at any time in the same car with her?

(Same objection by pl't'ff.)

Ans. No.

C. Int. 7. Did you see Mrs. Fishburn step off the platform of the car to the ground?

Same objection by plaintiff.

Ans. No.

C. Int. 8. Did you see the conductor or any of the brakemen have hold of her or appear to be putting her off the train?

(Same objection.)

Ans. No.

21 C. Int. 9. Did you hear any one order her to get off the train?

Same objection.

Ans. No.

C. Int. 10. Did you hear the conductor or any one of the brakemen use any rude, ungentlemanly, or abusive language to the plaintiff?

(Same objection.)

Ans. No.

C. Int. 11. If there had been any such language used while the conductor was on the platform would you have heard it?

Same objection.

Ans. It would depend on how loud they talked; I am a little hard of hearing.

C. Int. 12. Did you see any violent or ungentlemanly conduct toward her on the part of the conductor or any of the brakemen? (A. D. Kingsbury.)

(Same objection.)

Ans. No.

C. Int. 13. Did you state in your direct examination everything you heard the plaintiff or the conductor say at the time?

Same objection.

Ans. Yes; as near as I can remember.

C. Int. 14. Did you hear Mrs. Fishburne say anything in reply to the offer of yourself or Pickett, or ask to pay her fare?

Same objection.

Ans. No.

C. Int. 15. Did you hear the conductor say anything in reply when those offers were made?

22 (Same objection.)

Ans. Nothing except what I have already stated.

C. Int. 16. Was the train at a standstill all this time?

(Same objection.)

Ans. I think it was.

C. Int. 17. Do you know of your own knowledge what course the plaintiff took or what she did after the train went on?

(Same objection.)

Ans. No.

C. Int. 18. Do you know how long the train stopped there?

(Same objection.)

Ans. About a minute; possibly two minutes.

C. Int. 19. Could the plaintiff by going east on the railroad track a short distance and then south strike a highway leading back to the station of Edgerton without difficulty? (A. D. Kingsbury.)

(Same objection.)

Ans. She could go that way; by going round a little further that would avoid going across a trestle bridge.

Redirect:

Int. 1. How far back and to what distance would a person have to travel to reach the highway, and would a person not acquainted with the surrounding fields be apt or likely to — back the said highway to reach Edgerton from said place of occurrence?

23 Objected to as being incompetent and as calling for the opinion of the witness.

Ans. A person would probably have to go about 40 or 50 rods; a person would be likely to cross the railroad bridge.

Int. 2. How long have you resided in the village of Edgerton?

Ans. About eight years.

Int. 3. Do you own any real estate in the vicinity of the occurrence?

(Same objection.)

Ans. Yes.

Int. 4. How much baggage did the plaintiff, Mrs. Fishburn, have with her while on the ground at the place of said occurrence?

Ans. She had some. I don't know how much.

A. D. KINGSBURY.

Subscribed and sworn to before me this 24th day of September, A. D. 1885.

E. C. DEAN,
[SEAL.] *Pipestone County, Minnesota.*

A. R. BURKDALL, called and being first duly sworn, deposes and says:

My name is A. R. Burkdall; age, 34 years; my occupation is editor; I reside in Edgerton, Minnesota, and have resided there about two years and a half. I was residing there during the months of July and August, A. D. 1884. I know the plaintiff, Catherine Fishburn; have known her about two years. I knew her during

24 the months of July and August, 1884. I know Conductor Thomas in the employ of the defendant. To the best of my recollection, he was in the employ of the defendant during the months of July and August, A. D. 1884. I know of the occurrence to Mrs. Fishburn on the 24th day of July, A. D. 1884, near Edgerton Station, on defendant road. I understood that Conductor Thomas was in charge of the train that plaintiff's occurrence took place.

Int. 1. Did you have any conversation a day or two after the happening of the occurrence with the said conductor with reference to the said occurrence; and, if so, what was said conversation of the conductor to you? State the same fully as near as you can recollect.

(Objected to as irrelevant, incompetent, and immaterial, and because the question does not call for that which would be part of the occurrence or the *res gesta*.)

Ans. About two weeks after, on the train which Conductor Thomas was in charge, for my own information, I asked him concerning the occurrence referred to, and we had a conversation of about five minutes' duration. I asked him how it happened, and he told me Mrs. Fishburn had got on his train at Pipestone on the day of the occurrence with a ticket, I think, for Edgerton, and she asked him somewhere between Pipestone and Edgerton if he, Thomas, would stop the train long enough for her to buy a ticket further
25 east. He told her that he would, and upon reaching Edgerton they acquainted the agent of what they wanted. He told me that he went into the office at Edgerton to see her buy a ticket. I asked Mr. Thomas if he saw her get the ticket, and he said that he did not, but saw her hand some money to the agent and asked for a ticket. After he supposed that she had got the ticket he told her to get on board as soon as she could, and and saw her get on, and when he called for her ticket after the train was in motion she could not find it. She told him she could not find it, and supposed that she had lost it. He told her that she had better go back and hunt it. I do not recollect whether he stated that there was anything said about paying fare or not. He told me that he stopped the train and let her off. I do not remember whether he used the words "let her off" or "she got off." He told me that some persons on the train offered to pay her fare after she got off, but he said to me as the train was starting he did not want to keep the train there any longer; that she had lost her ticket and was going to hunt it, and that he told those parties she was going to hunt her ticket. He told me that he was somewhat put out about the matter, because he had delayed the train at Edgerton for her to buy her ticket, and that she had plenty of time to do it. This is all I recollect of his having told me.

(All the above evidence given in answer to int. 1 objected to, as above stated, by defendant.)

A. R. BURKDALL.

26 Cross-examination:

C. Int. 1. When and where did you have the above conversation with the said conductor?

(Objected to as I., I., I.)

Ans. I should think it was about two weeks after the occurrence referred to and on the train between Pipestone and Edgerton. I know nothing personally about the matter.

A. R. BURKDALL.

Subscribed and sworn to before me this 24th day of September, 1885.

[SEAL.]

E. C. DEAN,
Notary Public Pipestone Co., Minn.

S. A. PICKETT, being duly sworn, deposes and says:

My name is S. A. Pickett; my age is 50 years, and I reside in Murray county, Minnesota. In July and August, A. D. 1884, I resided in Edgerton, Pipestone county, Minnesota. I know the plaintiff, Mrs. Fishburn, and knew her in July and August, A. D. 1884. I knew her perhaps a year prior to that time. I knew defendant's line of railway in Pipestone county, and that it was operated in July and August, 1884. The railway strikes the county about the center on the west side, and runs in a southeasterly direction to
Edgerton, and makes a curve running northeast to the county
27 line. There are four stations on the line in this county, viz.,
Airlie, Pipestone, Hatfield, and Edgerton—Airlie & Pipestone being in the west part of the county and Hatfield and Edgerton being in the east part of the county. These stations were on the line in July and August, A. D. 1884. During July and August, 1884, as far as I had occasion to know, the defendants operated their road as far east as Ramsey, running passenger and freight trains. I was on one of defendants' passenger trains going east from Edgerton on the 24th day of July, A. D. 1884, and was on the same train that Mrs. Fishburn, the plaintiff, was on on said day. Said train was stopped east of Edgerton aforesaid a short distance. The first thing that I saw the train began to stop; it most stopped, started up again, and then stopped. I was in the car immediately behind the one that the plaintiff was in, and was in the front part of the car. The doors of the passenger cars were open clear through the train, and it was a very warm day. After the train stopped I saw a stir in the forward end of the next car ahead of me. I went there as quick as I could to see what the trouble was. (S. A. Pickett.) I went clear through the car ahead of me and out on the front platform with Kingsbury and Ask. When I got there Mrs. Fishburn was on the ground, the conductor was standing on the rear platform of the car ahead of me, and I think a brakeman was there and a few passengers, but I do not know who the passengers were. Mrs. Fishburn had some baggage there. I do not remember what it was.
My impression is that she had at least three packages, hold-
28 ing one in each hand and one on the ground.

Int. 1. Please state what you said to Mrs. Fishburn, the plaintiff, at the time of this occurrence.

(Objected to by defendant as being I., I., I.)

Ans. I stepped down on the lower step of the car on which I was standing, and on the north side. I told her to come back and I would buy her a ticket or pay her fare if she had no means with her.

Int. 2. What did Mrs. Fishburn say to you on that occurrence?

(Objected to by def't as I., I., I.)

Ans. She said, I don't know what to do. I think that was all I heard the woman say.

Int. 3. Please state what you said to the conductor at that time?

(Objected to by def't as I., I., I.)

Ans. I spoke to the conductor before I spoke to Mrs. Fishburn. I told him that Mrs. Fishburn was all right, and that we would pay her fare. I do not think that I said anything further to him.

Int. 4. What did the conductor say to you? (S. A. Pickett.)

(Objected to by def't as I., I., I.)

Ans. He said that she had left her ticket laying on the desk in the station at Edgerton, let her go back and find it; that he could not keep the train waiting there all day for her. I think that was all he said to me.

Int. 5. Please state all the conversation you heard at that time in the presence of Mrs. Fishburn and the conductor in reference to the occurrence?

29 (Objected to by the defendant as I., I., I.)

Ans. I do not remember anything else than has been stated.

Int. 6. Did you at any time of the occurrence hear any conversation between the conductor and Mrs. Fishburn? If so, state what was said.

Ans. I have no recollection of hearing any conversation between the conductor and Mrs. Fishburn.

Int. 7. Did you say anything to others in the presence of the conductor and Mrs. Fishburn in reference to the occurrence; and, if so, what?

(Objected to by def't as I., I., I.)

Ans. Yes; but do not recollect what was said, but made an expression of sympathy. All the conversation that I have testified to took place before the train started. I have examined "Exhibit A," and it fairly represents the defendant's track from Edgerton east to the place of this occurrence, and shows the trestle bridge over which the plaintiff would have to cross if she walked back to Edgerton on the railroad, and that bridge was there at that time. The bridge was at least 100 feet long, I should think, and about twelve feet wide, and I should think it was over 20 feet high. Where this occurred it was about 120 rods east of Edgerton and east of the bridge spoken of. (S. A. Pickett.)

In going back to Edgerton Mrs. Fishburn would have to walk on the ties of the railroad, and in passing over the bridge she would have to walk on the ties. This occurrence was on a clear day. This was sometime in the afternoon; I don't remember the exact

30 time. The conductor acted as if he was out of patience at the time of the occurrence, answering my questions sharply and quickly.

Cross-examination by d'f't's attorney:

I think that I have stated in my direct examination all the conversation that I heard at that time. I did not hear the conductor or any brakeman use any loud, ungentlemanly, or abusive language to the plaintiff.

(Pl'ff objects to question and answer first above.)

C. Int. 1. Did you hear the conductor or any of the brakemen order or tell the plaintiff to get off the train?

(Objected to by pl'ff as I., I., I.)

Ans. No.

C. Int. 2. Did you see the conductor or any of the brakemen take hold of the plaintiff and put her off or attempt to put her off of the train?

(Same objection by pl'ff.)

Ans. No.

C. Int. 3. Did you hear the plaintiff make any objection to getting off the train before or after she was off?

(Same objection.)

Ans. No.

C. Int. 4. Did you see the plaintiff before you saw her on the ground after leaving Edgerton Station? (S. A. Pickett.)

(Same objection.)

Ans. No.

C. Int. 5. Did you hear any of the conversation between her and the conductor while she was on the train and before you saw
31 her on the ground?

(Same objection.)

Ans. No.

C. Int. 6. Did you hear any conversation between her and the conductor regarding the cause of her leaving the train before you saw her on the ground?

(Same objection.)

Ans. No.

C. Int. 7. Did you know at the time or do you know now of your own knowledge, aside from anything you have heard, as to what the trouble was about?

(Same objection.)

Ans. No.

C. Int. 8. Were you at any time in the same car with the plaintiff on that train?

(Same objection.)

Ans. No.

C. Int. 9. Did you see her step from the car to the ground?

(Same objection.)

Ans. No.

C. Int. 10. Did you see any violent or ungentlemanly conduct on the part of the conductor or any of the brakemen toward the plaintiff at the time? (S. A. Pickett.)

(Same objection.)

Ans. No; except what I might infer from what I have stated above.

S. A. PICKETT.

Subscribed and sworn to before me this 24th day of September, 1885.

[SEAL.] E. C. DEAN,
Notary Public, Pipestone County, Minn.

32 C. W. ASK, being duly sworn, deposes and says:

My name is C. W. Ask; my age is 29 years, and I reside now and have resided in Edgerton, Pipestone county, Minnesota, for the last five years, and resided there during the months of July and August, A. D. 1884. I know the plaintiff, Mrs. Fishburn, and knew her during the months of July and August, A. D. 1884, and knew her a year prior to that time. I know of the defendant's line of railway located in Pipestone county and that defendant operated it in July and August, A. D. 1884. The railroad strikes the county about the center of the west side and runs in a southeasterly direction to Edgerton, and makes a curve running northeast to the county line in this county, and there are four stations on the line in this county, viz., Airlie, Pipestone, Hatfield, and Edgerton—Airlie and Pipestone being in the western part of the county and Hatfield and Edgerton being in the eastern part of the county. These stations were on the line in July and August, A. D. 1884. As far as I have occasion to know, the defendants operated their road as far east as LaCrosse, Wisconsin, from Edgerton. I was on one of the defendant's passenger trains going east from Edgerton on the 24th day of July, 1884, and was on the same train that Mrs. Fishburn, the plaintiff, was on on said day. Said train was stopped east of Edgerton station on said day a short distance. The first that I saw the train began to stop, started up again, and then stopped. I was standing up in the car behind the one that plaintiff was in, and was in the front part of the car. The doors of the passenger
33 cars were open clear through the train and it was a very warm day. A minute or so before the train stopped I saw the plaintiff talking with the conductor. (C. W. Ask). They were both standing in the center of the car in which they were, and as the train slacked up they moved to the front of the car. After the train stopped I went forward to the front end of the next car ahead of me to see what the trouble was. I went clear through that car and out on the front platform, and when I got there Mrs. Fishburn was on the ground. The conductor was standing on the platform. Mr. Kingsbury and Mr. Pickett came there right after me and stood on the platform. Mrs. Fishburn had some baggage with her; some of the baggage was in her hand and some was on the ground. I believe there was three or four packages.

Int. 1. Please state what you said to Mrs. Fishburn at the time of the occurrence.

(Objected to by def't as I., I., I.)

Ans. I do not recollect of saying anything to her.

Int. 2. What did you say to the conductor in regard to this occurrence?

(Objected to as above.)

Ans. I asked him what was the matter, and offered to pay her fare.

Int. 3. What did the conductor say to you in reference to this occurrence?

(Objected to as above.)

Ans. He said that she had no ticket, and that she had to get off the train, and that he did not have time to bother with her. That is all the conductor said to me.

34 Int. 4. Please state what was said by others (C. W. Ask) to the conductor or Mrs. Fishburn in reference to the occurrence in their presence or hearing.

(Same objection.)

Ans. I heard Pickett offer to pay Mrs. Fishburn's fare if she did not have the money. She made some reply, but I could not make out what it was. I have examined "Exhibit A," and it is a fair sketch or map of the defendant's railroad running from the station of Edgerton to the place of occurrence. I know that there is a trestle bridge between the station of Edgerton and the place of the occurrence over which the plaintiff would have to cross to return to the station of Edgerton on the railroad track, and would have to walk on the ties of the track, there being no other path. The bridge is from 100 to 120 feet long and about 20 feet high, and I should think about 10 to 12 feet wide. The day of the occurrence was clear. I do not know what time in the afternoon it was. Judging from his, the conductor's, speech, I should think he was vexed at the time of this occurrence.

Cross-examination:

I have stated in my direct examination all the conversation I heard at the time on the part of the conductor and Mrs. Fishburn.

C. Int. 1. Did you hear the conductor or any of the brakemen at any time use any loud, ungentlemanly, or abusive language to the plaintiff?

(Objected as I., I., I.)

Ans. No.

35 C. Int. 2. Did you hear the conductor or any of the brakemen at any time order or tell the plaintiff to get off the train? (C. W. Ask.)

(Objected to as above.)

Ans. No.

C. Int. 3. Did you see the conductor or any of the brakemen at any time take hold of the plaintiff and put her off or attempt to put her off of the train?

Same objection.

Ans. No.

C. Int. 4. Did you hear the plaintiff at any time make any objection to getting off the train before or after she was off?

(Same objection.)

Ans. No.

C. Int. 5. Did you see the plaintiff on the train after leaving Edgerton station before the time you saw her talking with the conductor in the car ahead of you?

(Objected to as above.)

Ans. No.

C. Int. 6. Did you hear any of the conversation between her and the conductor while she was on the train?

(Objected to as above.)

Ans. No.

C. Int. 7. Did you hear any conversation between her and the conductor regarding the cause of her leaving the train before you saw her on the ground?

(Same objection.)

Ans. No.

C. Int. 8. Did you know at the time or do you know now of your own knowledge, aside from anything you have heard, as to what the trouble was about?

(Same objection.) (C. W. Ask.)

36 Ans. No.

C. Int. 9. Were you at any time in the same car with the plaintiff?

(Same objection.)

Ans. No.

C. Int. 10. Did you see the plaintiff step from the car to the ground?

(Same objection.)

Ans. No.

C. Int. 11. Did you see any violent or ungentlemanly conduct on the part of the conductor or any of the brakemen toward the plaintiff at any time?

(Same objection.)

Ans. I saw nothing except what I have already stated.

C. Int. 12. At the time of this occurrence was the train at a standstill?

(Same objection.)

Ans. Yes.

C. Int. 13. Do you know of your own knowledge what course the plaintiff took and where she went after the train started on?

(Same objection.)

Ans. Yes; I saw her walking back on the track toward Edgerton station.

C. Int. 14. When you came to the front platform of the car in which she had been riding was she then standing on the ground? (Same objection.) (C. W. Ask.)

Ans. Yes.

C. Int. 15. Have you stated all you saw or heard at the time with reference to this matter?

(Same objection.)

Ans. Yes.

Redirect by pl't'ff:

37 R. Int. 1. Were you at any time before you saw the plaintiff on the ground able to see all that took place between the plaintiff and the conductor at the time of the occurrence?

Ans. No; not all the time, because there was some passengers standing up in the aisle of the car ahead of me.

R. Int. 2. Did you say in the 11th C. Int. that there was any ungentlemanly or improper conduct by the conductor toward the plaintiff at the time of the occurrence?

(Objected to as I., I., I.)

Ans. I answered that I saw nothing but what I had already stated.

R. Int. 3. Did you not consider the conductor's conduct towards the plaintiff ungentlemanly, rude, and improper at the time of this occurrence?

Objected to as incompetent, immaterial, and irrelevant, and as calling for the opinion of the witness, and as leading.

Ans. Yes; I did, from the fact of his making her leave the train.

Recross-ex.:

R. C. Int. Did you know then or do you know now that the conductor required or compelled her to leave the train?

(Objected to as I., I., I.)

Ans. No.

C. W. ASK.

Subscribed and sworn to before me this 25th day of September, A. D. 1885.

E. C. DEAN,

[SEAL.] *Notary Public, Pipestone Co., Minn.*

38 STATE OF MINNESOTA, } ss:
County of Pipestone, }

I, E. C. Dean, notary public in and for said county, do hereby certify that the above depositions were taken before me at my office, in the village of Pipestone, on the 24th day of September, A. D. 1885, and by stipulation by both parties commenced the taking of such depositions at the hour of one o'clock in the afternoon and adjourned and finished the taking of such depositions on the 25th day of September, A. D. 1885; that such depositions were taken at the request of the plaintiff on oral interrogatories that were reduced to writing by myself; that they were taken to be used in an action of Catherine Fishburn *vs.* The Chicago, Milwaukee and Saint Paul Railway Company, now pending in the circuit court of Green county, State of Wisconsin; that the reason- for the taking them were that the said witnesses resided at Edgerton, in the State of Minnesota, and would not be present at the trial.

That J. D. Dunwiddie attended the taking of said depositions for the plaintiff, and that A. H. Field attended for the defendant, and that a notice, of which the annexed is a copy, was served on the defendant on the 31st day of August, A. D. 1885; that said several deponents, before examination, were each sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, and that each of said depositions were carefully read to each of said deponents and then subscribed by each of them.

Witness my hand and official seal this 25th day of September, A. D. 1885.

[SEAL.] E. C. DEAN,
Notary Public, Pipestone County.

39 Endorsed: Circuit court, State of Wisconsin, county of Green. Catherine Fishburn *vs.* The Chicago, Milwaukee and St. Paul Railway Company. Depositions. Filed Sept. 25, 1885. Theo. W. Goldin, clerk.

STATE OF WISCONSIN:

Circuit Court, Green County.

CATHERINE FISHBURN, Plaintiff,
vs.
CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, Defendant.

To the Hon. John R. Bennett, the judge of said court:

The petition of the defendant above named respectfully shows that it is a citizen of the State of Wisconsin, and that the plaintiff is a citizen of the State of Illinois, and that it was a citizen of the State of Wisconsin at the time of the commencement of this action, and that the said plaintiff was a citizen of Illinois at the time of the commencement of this action; that the above-entitled action was commenced by the service of summons in said county on the 22d

day of August, A. D. 1885; that this action is brought
40 to recover the sum of ten thousand dollars, damages claimed to have been sustained by the plaintiff by being wrongfully ejected from one of defendant's passenger trains, as alleged; that the matter in dispute exceeds the sum or value of five hundred dollars, exclusive of costs, and that the October term, A. D. 1885, is the first term of said court at which said cause could be tried, and that it has not yet been tried; and your petitioner herewith presents its bond, with a good and sufficient surety, for its entering at the next term of the circuit court of the United States for the western district of Wisconsin on the first day of its next session a copy of the record in the above-entitled cause, copies of said process against said petitioner and of all pleadings, depositions, testimony, and other proceedings in the cause, and for the payment of all costs which may be awarded if said circuit court shall hold that this cause was wrongfully or improperly removed thereto, and also for the appearing and entering special bail in said suit if special bail was originally requisite therein; and your petitioner hereby offers to furnish such additional surety as this honorable court shall require.

Wherefore your petitioner prays this court to accept said petition and bond and to proceed no further in this action, pursuant to the provisions of the acts of Congress in that behalf.

JOHN W. CARY,
Gen'l Solicitor of C., M. & St. P. R'y Co.

Subscribed and sworn to before me this 5th day of October, A. D. 1885.

[SEAL.] BURTON HANSON,
Notary Public, Milwaukee Co., Wis.

41 Endorsed: Circuit court, Green county. Catherine Fishburn *vs.* C., M. & St. P. R'y Co. Petition for removal. Filed Oct. 6, 1885. Theo. W. Goldin, clerk.

Know all men by these presents that we, The Chicago, Milwaukee & St. Paul Railway Company, as principal, and John Johnston, of the city of Milwaukee, Wisconsin, as surety, are held and firmly bound unto Catherine Fishburn in the sum of five hundred dollars, to be paid to the said Catherine Fishburn, her executors, administrators, or assigns; to which payment, well and truly to be made and done, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals the 5th day of October, A. D. 1885.

Whereas the above-bounden Chicago, Milwaukee and St. Paul Railway Company has petitioned the circuit court of Green county, State of Wisconsin, for the removal of a cause therein pending, wherein the said Catherine Fishburne is plaintiff and said Chicago, Milwaukee & St. Paul Railway Company is defendant, to the circuit court of the United States for the western district of Wis-

consin, pursuant to the provisions of the acts of Congress
42 in that behalf:

Now, therefore, the condition of this obligation is such that if the above-bounden Chicago, Milwaukee and St. Paul Railway Company shall enter into such circuit court on the first day of its next session a copy of the record in such suit, copies of the process against petitioner and of all the pleadings, depositions, testimony, and other proceedings in the cause, and shall pay all costs that may be awarded by said circuit court if such court shall hold that such suit was wrongfully or improperly removed thereto, and shall also then and there appear and enter special bail in such suit if special bail was originally requisite therein, then this obligation shall be null and void; otherwise of force.

CHICAGO, MILWAUKEE &
ST. PAUL RA'Y CO.,
By JOHN W. CARY, *General Solicitor.*
JOHN JOHNSTON.

In presence of—
BURTON HANSON.
W. D. MILLARD.

STATE OF WISCONSIN, } ss:
Milwaukee County, }

I, John Johnston, of the city of Milwaukee, county of Milwaukee, and State of Wisconsin, the surety named in the foregoing bond, being duly sworn, do depose and say that I am a resident of the State of Wisconsin and a property-holder therein; that I am worth the sum of ten hundred dollars over and above all my debts and liabilities and exclusive of property by law exempt from execution.

JOHN JOHNSTON.

43 Subscribed and sworn to before me this 5th day of October, A. D. 1885.

[SEAL.] BURTON HANSON,
Notary Public.

Endorsed: Circuit court, Green county. Catherine Fishburn *vs.* C., M. & St. P. R'y Co. Undertaking for removal. Filed Oct. 6, 1885. Theo. W. Goldin, clerk.

THE STATE OF WISCONSIN:

Circuit Court, Green County.

CATHERINE FISHBURN
vs.
CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY. }

Upon filing the petition of the Chicago, Milwaukee & St. Paul Railway Company for removal of above-entitled action to the circuit court of the United States for the western district of Wisconsin

and the bond thereto attached, showing that all the proceedings for the removal of said above-entitled action into the circuit court of the United States for the western district of Wisconsin, pursuant to the statute in such case made and provided, have been taken, and that said suit is one proper for such removal, and on motion of
44 John W. Cary and Burton Hanson, attorneys for the petitioner—

It is hereby ordered that said suit be, and the same hereby is, removed into the circuit court of the United States for the western district of Wisconsin, and the clerk of this court is hereby directed to transmit and deliver to the clerk of the circuit court of the United States for the western district of Wisconsin copies of the record and of the process against said petitioner, and of all pleadings, depositions, testimony, and other proceedings in the cause.

Dated October 6th, A. D. 1885.

By the court:

JOHN R. BENNETT,
Circuit Judge.

Endorsed: Circuit court, Green county. Catherine Fishburn *vs.* C., M. & St. P. R'y Co. Order for removal. Filed Oct. 6, 1885. Theo. W. Goldin, clerk.

STATE OF WISCONSIN,
Circuit Court for Green County, Green County, } *ss:*

I, Theo. W. Goldin, clerk of the circuit court in and for the county of Green, State of Wisconsin, do hereby certify that the fore-
45 going and annexed papers-writings are copies of the original summons and complaint, answer, notice of taking deposition-, depositions, map, & certificate of taking depositions, petition and undertaking for removal, and order for removal, which have been filed in my office in the action wherein Catherine Fishburn is plaintiff and The Chicago, Milwaukee & St. Paul R. R. Co. is defendant, and that the same are hereby transmitted to the circuit court of the United States for the western dist. of Wis. in pursuance of the order of this court, a copy of which is hereto attached.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office, in Monroe, in said county, this 15th day of October, A. D. one thousand eight hundred and eighty-five.

[SEAL.]

THEO. W. GOLDIN, *Clerk.*

Endorsed: Circuit court, Green county. Catherine Fishburn *vs.* The Chicago, Milwaukee and St. Paul R'y Co. Record. Filed Oct. 16, 1885. F. M. Stewart, clerk.

46 And thereafter, to wit, in the term aforesaid and on the 12th day of December, A. D. 1885, appears in the record of proceedings aforesaid in said cause the following entry, to wit:

Trial.

CATHERINE FISHBURN, Plaintiff,
vs.
THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, Defendant.

This day came the parties, by their attorneys, and this cause came on to be tried; whereupon a jury is ordered to come, who came, to wit, S. A. Spofford, Joseph S. Kidd, J. N. Jones, B. G. Paddock, Geo. Fox, Robert Collins, D. S. Domath, Ole Monson, A. L. Lund, William Wilson, James Gallagher, David Welch, twelve honest and lawful men of the district, duly empanneled, tried, and sworn, and the trial commenced.

And thereafter, to wit, on the 15th day of December, in said December term, A. D. 1886, in the record of proceedings aforesaid, appears the following entry, to wit:

Verdict.

CATHERINE FISHBURN
vs.
THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

47 This day came the parties, by their attorneys, and, the trial being concluded, the jury is instructed in the law by the court, and retire to consider of their verdict, with permission to return a sealed verdict.

And the jurors of the jury aforesaid upon their oaths do say that they find the issue herein in favor of the defendant; and came the plaintiff, by her attorney, and moved the court to set aside the verdict herein and to grant a new trial.

And thereafter, to wit, on the 17th day of September, A. D. 1886, in the entry of proceeding- aforesaid, appears the following order and judgment, viz:

Judgment.

CATHERINE FISHBURN, Plaintiff,
vs.
THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, Defendant.

This day came the parties, by their attorneys, and the court being sufficiently advised in the premises, it is ordered that the plaintiff's motion to set aside the verdict and for a new trial herein be and is hereby denied. Whereupon it is considered and adjudged by the court now here that said defendant, The Chicago, Milwaukee and Saint Paul Railway Company, do have and recover of said plaintiff,

Catherine Fishburn, the sum of one hundred and thirty-nine
48 dollars and seventy cents, its costs about its said suit in this behalf expended, and that it have execution therefor.

Judgment-roll signed September 17, 1886.

F. M. STEWART, *Clerk.*

Costs, $139.70.

And thereafter, to wit, on the 11th day of January, A. D. 1887, came the above-named plaintiff, by her attorney, and filed herein the following

Bill of Exceptions.

49 United States District Court, Western District of Wisconsin.

CATHERINE FISHBURN, Plaintiff,
vs.
THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, Defendant.

To John W. Cary and Burton Hanson, attorneys for the defendant:

The annexed is a proposed bill of exceptions in this case.

Dated Monroe, Wis., October 23d, 1886.

B. DUNWIDDIE,
Pl'ff's Att'y, Monroe, Wis.

B. F. DUNWIDDIE, *Of Counsel.*

50 [Endorsed:] United States circuit court, western district of Wisconsin. Catherine Fishburn, plaintiff, *vs.* The Chicago, Milwaukee and St. Paul Railway Company, defendant. Bill of exceptions.

51 *Plaintiff's Complaint.*

STATE OF WISCONSIN, } *ss:*
County of Green, }

Circuit Court, Green County.

CATHERINE FISHBURN, Plaintiff,
vs.
THE CHICAGO, MILWAUKEE AND ST. PAUL RAILROAD COMPANY, Defendant.

This plaintiff states and shows unto this court:

I. That the defendant was on the 24th of July, A. D. 1884, and from thence hitherto and now is a railroad corporation, owning and operation a railroad from the city of Chicago, in the State of Illinois, by way of the cities of Milwaukee and La Crosse, in the State of Wisconsin, and thence westerly through the southern part of the State of Minnesota (under the corporate name of Chicago, Milwaukee

and St. Paul Railroad Company), having many other branches and subdivisions, one of which connects the said railroad of the city of Milwaukee, running thence westerly by way of Milton and the city of Janesville, in the county of Rock, to the city of Monroe, in the county of Green, in the State of Wisconsin, duly incorporated under the laws of the State of Wisconsin under the name aforesaid.

II. That on the 24th day of July, 1884, this plaintiff, on the morning of said day, was at the station of said railway in Pipestone county, in Southern Minnesota, intending to start on said day to the city of Chicago, in the State of Illinois; but, having a daughter residing at Edgerton, in said county of Pipestone, and this plaintiff, desiring to stop at Edgerton aforesaid, purchased a ticket at Pipestone, in said county of Pipestone, to Edgerton aforesaid, and boarded a train for Edgerton; and this plaintiff, after boarding the said train, decided that if she could purchase a ticket at Edgerton aforesaid to Chicago aforesaid and proceed on that train she would do so, and for that purpose this plaintiff spoke to the conductor of that train of and concerning her said intention, and asked him if he would hold the train at Edgerton until this plaintiff would have time and opportunity to purchase a ticket of the ticket agent at Edgerton from the said Edgerton to the city of Chicago aforesaid, in the State of Illinois, and the conductor agreed to hold the train and aid this plaintiff in purchasing said ticket; and the said train arrived at Edgerton aforesaid between the hours of three and four o'clock in the afternoon of said day, and this plaintiff got off the said train, and the conductor of said train went in company of this plaintiff to the ticket office of the defendant at said Edgerton, station of the defendant, and asked the ticket agent to sell the plaintiff a ticket from Edgerton aforesaid to Chicago aforesaid, on said train; and the said agent got *his* ticket on said road and held it in his hand and stated the price of said ticket, which was $12.50. This plaintiff, not having the change, gave the said agent a twenty-dollar bill. The said conductor stood by and saw the plaintiff hand the said agent the said bill; the said agent took the said twenty-dollar bill and gave this plaintiff some change in currency and silver, which this plaintiff took in her hand. While this plaintiff was in the act of taking the change the said conductor called out, "All aboard," and this plaintiff, thinking that she had received the ticket with the change, held her change in her hand, thinking the ticket was with it, and walked hurri-dily to the train, having no time to count the change or to examine it, or to examine whether the ticket was within the bills and change, and on boarding the car thrust the bills and change into the pocket of her dress, supposing the ticket was with the change, and the conductor boarded the train at the same time with the plaintiff.

III. And the plaintiff further shows unto this court that east of Edgerton aforesaid there is a large stream of water or creek, and defendant's railway crosses it on a high bridge and trestle-work, which is about 25 feet above the water and about 75 feet long, and after crossing the said creek on said trestle-work the track turns and runs east and follows the bank of the creek three or four miles,

with high embankments one one side of the road & steep slopes on the other for a long distance; so that after crossing the said creek on said trestle-work there is no way of returning to said Edgerton aforesaid only by going back over the trestle-work and bridge or traveling east on the railroad track until reaching a highway crossing the railroad track at right angles, and then following the highway north or south to an intersecting road running east and west, which runs into Edgerton aforesaid, and to go east to said highway plaintiff would have to travel about four miles; that the said trestle-work was about one-half mile east of said Edgerton station.

IV. This plaintiff shows unto this court that, after boarding said train and said train had proceeded eastward from Edgerton aforesaid and towards said trestle bridge, the said conductor called on this plaintiff for her ticket, and the plaintiff then searched for her ticket, and after making a careful search found she did not have said ticket and so informed the said conductor. The said conductor then, with rude and ungentlemanly language, spoke to the plaintiff and said she must get off the train and go back and hunt her ticket, and the conductor pulled the bell-rope of the train, the train slacked up, but run on until it reached the east end of the trestle bridge; then the train stopped.

The conductor then seized the plaintiff in a violent and ungentlemanly manner by her shoulder, ordered her to get her baggage
54 and get off the train, and the said plaintiff gathered her baggage, and the said conductor forcibly put this plaintiff off the train.

This plaintiff had friends on the said train—two or three gentlemen who were acquainted with this plaintiff—and when the plaintiff got off the train the- protested to the conductor and wanted this plaintiff to get back on the train, and offered to pay her fare, and the said conductor, in an excited manner, using language showing that he was under great excitement, replied, "No; she has lost her ticket; let her go back and find it." This was about four o'clock in the afternoon of said day, the weather being exceedingly warm and the sun shining brightly.

The plaintiff's baggage, consisting of a satchel, a basket, a shawl-strap, a parasol, and a gossamere, altogether weighing about 50 pounds, this plaintiff not knowing what to do, decided that the best thing she could do was to walk back to Edgerton aforesaid and carry her baggage, which she was compelled to do, walking back on the high trestle bridge, compelled to step on cross-ties as a means of crossing, and did so cross over said bridge and carry her baggage; that this plaintiff was at the time about the age of 49 years, and was not at that time in good health, but was afflicted with nervous weakness and rheumatism, and this plaintiff's general condition was that of nervous debility. And the plaintiff further shows that by reason of being so put off the said train and by reason of her extreme mortification and wounded feelings acting on the nervous system of this plaintiff, and being so overburdened by carrying the said baggage over the said bridge and trestle in the hot sun, — gave way and sank down upon the ground through exhaustion

and weakness and had to wait a considerable time before the plaintiff recovered to go on; then, gaining strength, this
55 plaintiff walked back to the defendant's station at Edgerton aforesaid, a distance of about one-half mile, and went to the station agent aforesaid and informed him that this plaintiff had been put off the train because she did not have her ticket, and the agent replied in positive terms that he had given this plaintiff her ticket, and that she had lost it. Nevertheless this plaintiff, having a daughter in said Edgerton, went to her daughter's to stay, and informed the said agent where she was staying, and on the next day, about 10 o'clock, the said agent came to the residence of this plaintiff's daughter and informed this plaintiff that he had found the ticket; that he had put it in the safe with the money by mistake, and offered then to refund the money or to issue a new ticket. Although the said agent offered this plaintiff a new ticket as aforesaid, yet the plaintiff was wholly unable to accept of the offer, but was so prostrated and so weak and so exhausted and so debilitated by reason of this plaintiff's being compelled to walk back on the track aforesaid this plaintiff became sick and was compelled to remain over at her said daughter's, in the said Edgerton, during the days of the 25th, 26th, 27th, & 28th of July aforesaid, and could not proceed on her journey; by reason whereof this plaintiff was damaged in the sum of ($10,000) ten thousand dollars.

Wherefore this plaintiff demands judgment against the defendant for the sum of ten thousand dollars, besides the costs of this action.

B. DUNWIDDIE,
Plaintiff's Attorney, Monroe, Wis.

56 Circuit Court, Rock County.

CATHERINE FISHBURN, Plaintiff,
vs.
THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, Defendant.

The defendant, for answer to the plaintiff's complaint herein, denies each and every allegation, matter, fact, and thing stated therein.

JOHN W. CARY &
BURTON HANSON,
Defendant's —.

57 Be it remembered that on the 6th day of October, 1885, on application of the defendant, by its attorneys, John W. Cary and Burton Hanson, the said action was removed into the circuit court of the United States for the western district of Wisconsin, and that the trial of said action was had before the said circuit court at the December term of said court, appointed to be held at the United States court room, in the city of Madison, on the first Tuesday, being the 1st day, of December, 1885, to wit:

On the 14th day of December, 1885, the above-entitled cause came on to be heard and tried before the said court, the Honorable Romanzo Bunn, district judge for the western district of Wisconsin, presiding, and a jury duly empaneled and sworn; and there came as well the said plaintiff, by B. Dunwiddie, H. M. Lewis, and B. F. Dunwiddie, her counsel, and the defendant, by Burton Hanson and H. H. Field, its counsel.

Whereupon the said plaintiff, to maintain the issue on her part, produced as her first witness CATHERINE FISHBURN, who, being duly sworn, testified as follows, viz:

My name is Catherine Fishburn. I am a married lady and reside at Orangeville, Ill., and have resided there 7 years. On the 24th day of July, 1884, I was at Edgerton, Pipestone Co., Minnesota. I had been there from the 1st of April until into July. I know of the defendant corporation, The Chicago, Milwaukee and St. Paul Railroad Co., operating a road through that county. The only stations I know in the county were Edgerton and Pipestone. Pipestone is in the southwestern part of the county, and Edgerton is about 15 or 16 miles east of Pipestone City.

I had business with the defendant company that day. I had made an appointment with my husband; had to go home on business, and consequently I wanted to go over that road to get
58 home, and in the morning I had a little business up at Pipestone, and I took the 8 o'clock freight and went up to Pipestone City, and was going to return on the 1 o'clock freight; but when I got there the ticket agent told me that the freight was an hour or an hour and a half late, and that I would get there on the passenger just as soon as I would to go on the freight; so I stayed until the passenger came along, and then I purchased a ticket to Edgerton. I had made my arrangements that my daughter would be there with my baggage, what I wanted to take through with me, and I would get a ticket and go on; so when the conductor came around and took up my ticket from Pipestone to Edgerton I asked him would he wait for me to purchase a ticket to Chicago, and he said, "We will wait for you;" so when we got to Edgerton I was at the door, and as soon as the train stopped I stepped off, and Mr. Smith, the ticket agent, and quite a number of others were standing on the platform, and the conductor at the same time said, "Give us a ticket to Chicago." I said, "I want a ticket to Chicago as soon as you can get it." I don't know just how the conductor said it, but he asked about the same time for a ticket to Chicago.

COURT: The conductor did?

A. Yes, sir.

COURT: Told the agent?

A. Yes, sir; and I walked right alongside of the ticket agent in to the side of his desk; stood right side of his desk. My daughter had all my baggage in her hands and on her arms, and she and the conductor walked right through the office into the waiting-room and stood right at the window. I took a twenty-dollar bill out of my purse and handed it to the ticket agent, and he had torn off my

ticket or had it already stamped and was holding it in his right hand, and when I handed him the bill he started to the safe, and my daughter then spoke to the conductor. Said she, "Mr.
59 Conductor, will you please help my mother with her baggage in changing cars, as she is an invalid by rheumatism?" And he shouted, "I only go to Wells," and at that he walked right out on the platform and called out, "All aboard;" and then my daughter—says she, "Hurry up, Mr. Smith, or my mother will get left;" and just as soon as Mr. Smith come and handed me my change I had my change and purse in my right hand and started for the train, and when I got to the door Mr. Smith handed me my parasol and gossamer and I started for the train, and I was getting on the hind car, and my daughter was then standing at the first car next to the smoking-car, and she says, "Mother, get right on here."

The brakeman was standing there. I still had the purse and change in my right hand & parasol in my left, and the brakeman took hold of my arm and helped me upon the car, and my daughter came right after me, and just as I got inside the door and my daughter got to the door the conductor shouted out "Put that woman off; she ain't a-going." That was my daughter, and at that the train started off, and she dropped my baggage inside of the car door and ran off.

I had on a long duster with pockets, and I dropped my change and pocket book all loose right into my pocket. I gathered up my things and walked about the middle of the car and set my baggage down on the seat, and the first thing I did I got my change and put it in my purse and put that under my duster into my dress pocket and sat down, and then I thought "Where is my ticket" the first thing, as I always prepare my ticket so as to save time and have it ready, and I began to look for my ticket, searched all through my pockets, looked through my purse, and couldn't find my ticket. I looked all through my baggage, then I thought perhaps I had dropped it, having it in my pocket with my change near the door wher- I picked up my baggage, so I walked down the aisle
60 looking at where I had picked up my baggage, and when I turned around there was an old gentleman setting opposite to me. Says he, "What are you looking for, lady?" I said, "I am afraid I have lost my ticket." Said he, "You didn't have it in your hand when you came in," and he could see every move I made, for the doors were all open and he was facing me when I came in. I went back to my seat and looked among my baggage again, and another time through my pockets, and didn't find the ticket. I just got up again, and was standing in the aisle when the conductor came in. I was consoling myself that he saw me buy the ticket. I didn't feel at all alarmed, for the conductor called for the ticket as well as myself, and saw me pay for it, and I thought he would be kind and merciful to me, and the minute I had said "I am afraid I have lost my ticket," well, said he, "You must get right off here, then," and immediately put up his hand and pulled the bell-cord. Well, I was so shocked I just stood and looked at him. He said it in such an ugly manner, and the train began to slack up

pretty near to a standstill, and they were right on this long trestle bridge, and of course wouldn't stop there. Finally, pulled up again and commenced going faster and faster, and that seemed to enrage the conductor so that he fairly jumped at me. Says he, "Get your baggage," and at that he reached up to ring the bell again, and did ring it just as hard as he could, and I just kind of sank down. Said I, "Well, I can't," and that was all I could do. I set there. At that, while he was yet ringing the bell, the brakeman came in, and he said to the brakeman, "Get this woman off here;" and I was standing right back, kind of holding on to my seat. The brakeman stepped right into my seat and took all my baggage and walked out with it, and as soon as he had walked out—the train was not yet at a standstill—the conductor took me here by the shoulder and
61 just urged me along, and the minute the train came to a standstill he shoved me out of the door. The brakeman got down and put my things down and helped me down, and said the conductor, "You can walk back." At that, as I was standing there, I heard a voice and looked around and saw Mr. Pickett, a neighbor of mine. He had boarded the train to go to St. Paul.

He was standing on the platform with several other gentlemen, my neighbors, though I didn't recognize anybody but Mr. Pickett at the time. Said he, "What does this mean?" Says I, "I guess I have lost my ticket." Says he, "Come on, we will pay your way." This was in the presence of the conductor. He was right there on the platform. When the train was gone I was on the side of the track. To get back there was but one way and that was, as he told me, to walk back. I picked up my things and started back. I had a large satchel, a large basket, a shawl strap—all that I could strap into it—and a gossamer and parasol. My things weighed not less than 30 or 35 pounds, and it was a very hot day. I went over the trestle bridge across the creek, which was about 120 ft. long and 20 ft. from the water, stepping from tie to tie. When I got across the bridge I saw my daughter had seen me and was coming, and I sat down alongside the track on some of my baggage and cried and waited until she came, then went to her house. I was very much overheated when I got to her house. I had got so nervous I could hardly sit still, stand still, or keep quiet anywheres. "I walked across the street into Mr. Pickett's house and sat down; then my daughter and I went over to the depot. Several gentlemen were there. We looked for the ticket and could not find it nowhere along the platform. We talked a little and then went home; but before I went home I told the agent to telegraph to the next station to have them take another look in the car for my ticket. About 7 o'clock in the evening my daughter and I went over to see
62 whether the agent had got word from the ticket, whether it had been found, and he told us it had not. Then I walked over to the postmaster's." When I got up the next morning I was sick. While I was sitting in the rocking-chair, about 10 o'clock, the ticket agent came over and said, "Mrs. Fishburn, you can go this afternoon; your ticket is found." I said, I am sick and can't go now; where did you find it? He said, When I opened the safe I

found it in the safe with the twenty-dollar bill that you paid me. I will either issue a new ticket or pay you your money back.

I said, Well, there is no hurry about that, Mr. Smith. And so we left it. I was sick and not able to go that day. On Thursday night, Friday, Friday night, and Saturday I was very nervous and restless and couldn't sleep. I was sick all over and so full of pain that I could not keep quiet nowhere.

My husband was to meet me in Freeport on Saturday and take me home to Orangeville, which is 12 miles from the station, and on Friday I telegraphed him that I had been detained. I had been stopping at Edgerton that summer with my daughter for my health. It was always better for me in that country, and I had gone up there for my health. I was getting very much better—better than I had been for six or eight years; but on account of business had to take this trip home, and since then I have been getting worse.

It was a great disappointment to me in not being able to get home to tend to my business, and I knew my husband would be disappointed, as he couldn't hear from me for 3 or 4 days, and didn't know what had happened, because I had written him I would start on that day; and, all these things together, I felt grieved in the way I had been treated; and was very nervous, having been overheated carrying so much baggage. Of course it made
63 me sick, being an invalid anyhow. Have been for over 25 years. Saturday night I was taken with nervous chills. I never was so sick in my life; nervous chills, just one after another. I waked my daughter up and she gave me a large dose of laudanum and nitre, and after a little I kind of got my nerves quieted down and felt better and slept. Sunday and Sunday night I rested better, with an occasional chill, but feeling very bad, very weak and pro-trated; but I improved from that on; and knowing that I had got to go home on my business I rallied as hard as I could to try to get strength enough to start, and started Tuesday evening at four o'clock. My general health for some years has been very poor; have had the rheumatism in both my hands and feet so that I cannot straighten them any more.

Q. Give a description of how it affected your feet and powers of walking?

Objected to as immaterial, there being no allegation claiming a permanent injury in the petition.

COURT: What is the purpose of that testimony?

PL'FF'S COUNSEL: To show that she was infirm, and on account of that she had an extraordinary claim on the agents of the defendant, and that they had knowledge of it.

COURT: She may describe her condition at the time the accident happened.

Q. Describe your feet at the time the accident occurred. Describe what condition you were in as to the power of walking.

Objected to on the ground that it does not appear that the conductor had knowledge that the rheumatism was in her feet.

COURT: She has already testified that she was an invalid from rheumatism. I don't think it worth while to go into the particulars of that.

PL'FF'S COUNSEL: She had laid this foundation, that she was put off at a place where she had to step over a trestle, stepping from cross-tie to cross-tie, and if her powers of locomotion were
64 impaired by disease she would be infirm in that degree known by law, which would demand extraordinary care of the agents of the defendant common carrier.

COURT: She has already stated, I think, all that we need on that point in regard to her condition.

Exception by pl'ff.

Q. You have already stated that while you were there at Pipestone in that country your condition was improved.

A. Yes, sir.

Q. Since that occurrence what has been your condition?

Objected to.

COURT: There is no allegation in the complaint in regard to the general impairment of health, so I do not think you can go into that.

Exception by pl'ff.

—. There was no one in the car at the time that I knew. A Mr. Pickett, Mr. Ask and Mr. Kingsbury, whom I knew and who lived in Edgerton, were on the rear car, but I did not know it until they came out on the platform after I was on the ground. The conductor did not make any answer that I heard in regard to their proposition to pay my fare. Mr. Pickett offered to pay my fare before the train started.

Q. You had means to pay your fare?

A. Yes, sir.

Q. Did he ask you to pay your fare?

A. No, sir.

Q. Were you willing to have paid it if he had demanded it?

A. Yes, sir.

Cross-examination:

I bought a ticket in the morning at Edgerton to go to Pipestone. It was not a round-trip ticket. I went up to Pipestone, and then wanted to return to Edgerton and stop off there before proceeding to Chicago. I bought a ticket at Pipestone for Edgerton. I
65 know I did not purchase a round-trip ticket at Edgerton. After I boarded the train to return from Pipestone I asked the conductor would he stop for me to get a ticket to Chicago. I didn't know at the time what the conductor's name was. I made arrangements with the conductor to allow me to get off at Edgerton and give me time to go into the ticket office and purchase a ticket to Chicago. He said he would give me time to get a ticket.

When the train got to Edgerton I got off; my daughter was there, she had this luggage for me; when I got off I spoke to the ticket agent and told him I wanted a ticket; the agent went into the ticket office and I went in with him and asked him for a ticket to Chicago; the price I don't remember, $12.50 I think. I handed him a twenty dollar bill. I saw the agent make out the ticket, I think he wrote in the destination from Edgerton to Chicago; he had the ticket in his hand made out when I handed him the bill; he walked across, I don't know how many steps, to get the change, I think it was perhaps three or four steps; he had his money in the safe; he took the change out of the safe and gave it to me, part in bills and part in silver, and then I started for the train. I walked out on the platform, all the time supposing that I had the ticket that I had paid for; my daughter was with me; when I got out on the platform I saw the conductor standing out towards the engine; my daughter got onto the car with me; the conductor had cried, "All aboard" before I got my change; he cried, "All aboard" just once; he could see us get on. I got onto the coach next to the rear, about the middle of the car; there may have been perhaps a couple of dozen passengers in the car; they were strangers to me. I couldn't tell how many. I knew none of them. I took my seat on the south side, on the left hand side. I was the first passenger from the front end of the car; before the conductor came in I had been looking for
66 my ticket; when the conductor came in for my ticket I said, "Mr. Conductor, I am afraid I have lost my ticket." He said, "Well, you must get right off then;" this was the first thing that he said; he didn't say anything more until after the train started up again after that slack; then is when he fairly jumped at me and said, "Get your baggage;" he did not lay hands on me just at this time, for I was standing holding onto my seat and said, "I can't—well, I can't;" he did not say he would stop the train and let me go back after my ticket, nor that he would take me to the next station and I could buy a ticket at Fulda; there was no such conversation as that. I would have been too glad to have done that; the first thing he said was that I must get right off; then he pulled the bell cord, the train slacked up and was on the bridge, and then they began to pull up and go quite fast; that seemed to enrage him; then is when he fairly jumped at me and said, "Get your baggage," and I kind of sank back and held onto the seat; said I, "Well, I can't;" at that the brakeman came in while he was there, yet the car hadn't come to a stand still when the brakeman came in; he said to the brakeman, "Get this woman off here," and the brakeman stepped right in front of me and took my baggage out of my seat and started down the aisle; then is when the conductor took me by the shoulder; I think, as I remember, he used both hands, and was holding me by——

Q. Where were you when he put his hand on you to take hold of you?

A. At my seat. I was standing in the aisle holding onto my seat. I did not resist his attempts.

Q. He took hold of you and then you got up and walked through the aisle, did you?

A. Yes, sir; the brakeman walked ahead of us with my baggage and the conductor followed; was right side of me holding me by the shoulder; he certainly hurried me along. I don't know what he intended it for, but he was hurrying me along. That was the
67 way I take it. In the frame of mind and the disposition and temper he showed I think that he meant it to put me off as violence, I do think. He did hurt me. I am so affected with rheumatism that just a single touch, almost, does hurt me. Of course I was so weak I could hardly walk, I was so shocked. I didn't take it that he took hold of me to assist me. The train came to a standstill before we got to the door, then the brakeman got down on the ground and helped me off. The conductor *said* in the door and said, "You can walk back." He did not say I could stand at the side and the train would pass and then I could walk back. He never said that I could either get off and go back and hunt for my ticket, or could go on to Fulda and buy a ticket there. I did not ask his advice as to what to do. I did not ask his advice nor he didn't tell me that as long as I had paid $12.50 for my ticket he advised me to go back and find it, if I could. I know there was no such conversation. I didn't ask for advice and he didn't give any. After I was on the ground Mr. Pickett came out of the rear coach & spoke to me. The first that I heard was my name called out, "Why, Mrs. Fishburn, what does this mean," or what are you off for? I can't tell which of those words he used; and all the reply I could make was, "I guess I lost my ticket;" and then he said, Why, come on, we will pay your way. I don't remember whether I made any other reply to him or not; I couldn't say as to that. I couldn't say whether I said I didn't know what to do, whether to go on or whether to go back and hunt for my ticket; all I remember saying is, "I guess I lost my ticket." Mr. Pickett did not say he would pay my fare if I had no money or means with me. I know he did not. He did not qualify it in that way, I am sure of that. I had means with me to pay my fare. I don't know what kind of a ticket it was that I bought. I simply asked for a ticket as quick as
68 he could get it and never saw it. This is all that occurred while the train was standing still. I didn't hear any conversation after I was on the ground except what Mr. Pickett said, "Come on we will pay your way," for the conductor signalled, rang the bell, and they started. I did not hear the conductor say, "No, she don't want to go on, she has lost her ticket and wants to go back and find it." I didn't recognize Mr. Ask and Mr. Kingsbury. After the train started I was somewhere near a half mile east of Edgerton, perhaps a little more. I had quite a large satchel, or valise as you would call it, a shawl strap and a large basket full and my gossamer and parasol. I then started and walked over the trestle bridge, stepping on the ties which were square sawed timbers. When I got to the west end of the trestle work I felt weak and exhausted and sat down until my daughter came up, and she helped me carry the baggage—my package and luggage—to the house. We went first to

the house and then went and looked for the ticket. We went to the station, which is some 10 or 15 rods, and told Mr. Smith, the agent, about the ticket; he said he was sure he gave it to me, and helped some of us to look for the ticket. We looked on the platform and along the track and wherever we thought it might be. I asked the agent to telegraph the conductor to look through the train and he said he did. We didn't find the ticket, and then we went to my daughter's house again. The next morning the agent came up about 10 o'clock, when I got up. After I got up I was sitting in the front room and my daughter was combing my head—I was in the rocking chair; then Mr. Smith came over and said, "You can go now, Mrs. Fishburn, this afternoon, your ticket is found;" said he had found it in the safe. I told him I was sick and couldn't go, and he said when
69 I got ready and wished to go he would refund the money or issue me a new ticket. I told him there was no hurry; so the ticket was left there until the Tuesday following. He had the money till then, too. On Tuesday afternoon I bought a new ticket for Dubuque; whether it was more or less I couldn't say; whatever it was he paid my dues. I did not offer to pay my fare after I got off on the ground. The conductor didn't give me any time to make an offer in the car, he just told me I must get off.

Q. You are positive of that?

A. I know it; yes. As soon as I told him I had lost my ticket he said, "You must get right off," and pulled the bell cord. When he first pulled the bell cord, and when the train first came to a halt, it was on the trestle work, and I presume the reason they went on was to get over it. I had no physician while I was at my daughter's. I simply stopped with her three or four days until I felt well enough to proceed with my journey.

Redirect examination:

There was no physician at Edgerton. The nearest one was at Pipestone City, 15 or 16 miles away. When I finally came home I did not go to Chicago, but came to Dubuque, as that was the only way I could get home in time. When the agent gave me the money he did not lay it down, but gave it to me right in my hand. I did not put it in my pocketbook or make any examination of it until I got on the car. I supposed I had my ticket in my hand with the money.

Re-cross ex.:

I thought I had my ticket.

Whereupon the said plaintiff, to further maintain the issue on her part, produced as her second witness—

MARIE ANTOINETTE BAKER, sworn, testified as follows:

My name is Marie Antoinette Baker. I am the daughter of Catherine Fishburn, and was at Edgerton, Pipestone county, Minnesota, on the 24th of July, 1884. I met my mother, as per agreement, at the Edgerton depot for the 4 o'clock train. The train was about

half an hour late, and consequently I waited there. When
70 the train arrived she and the conductor stood on the platform of the car. I says, "What is it, mother?" She says, "I must get my ticket." She and the conductor both stepped off and spoke to Mr. Smith, the agent, at the same time. Says to Mr. Smith, "Give us a ticket to Chicago," and the conductor says, "Be quick about it." They passed into the waiting room, my mother by the side of the ticket agent. Mr. Smith stepped inside the ticket office door, and Mr. Thomas, the conductor, to the window. As Mr. Smith took the ticket-box from his desk I said to the conductor, "Sir, will you please help my mother in changing at Ramsay. She is an invalid from rheumatism." He says (and very sharply), "I only go to Wells." Mr. Smith at that time was signing the ticket. He tore the ticket from the duplicate, stamping it, and my mother drew her purse from her pocket and took a twenty-dollar bill from it. I spoke and said how much is it, & says it is twenty, and handed it to Mr. Smith. As she handed him the bill he took it in his right hand and turned from the window to the safe, and the conductor stepped from the window, calling, "All aboard." I says, Mr. Smith, hurry up or mother will get left. As he stood at the safe he took the change and handed it to my mother. I supposed she had the ticket. I didn't notice, as there was a blue paper in her purse. The color of the ticket was blue, so I supposed naturally she had her ticket with her. She took the change in her right hand and stepped from the office door to go down onto the platform, and Mr. Smith handed her a parasol. I stepped quickly after her with the baggage in my hand, and says to her as she was going by, "Here, mother, get on this car; they are ready to go." She stepped up, and the brakeman, taking her by the left elbow, helped her on the train. As she stepped inside of the car I was stepping from the second step of the car onto the platform. The conductor stood down
near the engine and called out to the brakeman, "Put that
71 woman off; she ain't going." The brakeman says, "Hurry up; the train is going," and I just dropped the things. I called, "Good bye, mother," and the train was then under motion. The brakeman caught me by the right arm as I sprang off the train, and I walked off uptown with the rest of the friends, not supposing there was anything wrong. The first thing I knew my attention was called down the track, a gentleman saying, "Mrs. Baker, there is a lady off. Isn't it your mother?"

I sprang quickly where I could get a look down the track, and I says, "Yes, that is mother; what can be up?" And I ran to the house immediately, unlocking the door, and throwing down the packages I had in my arms right onto the floor, and ran just as fast as I could for the track. She saw me coming, and sat down by the side of the track on her valise, and when I got there she sat there crying. Then she told me what was the matter, and when she had got sufficiently rested I picked up the baggage and we started for the house. We got to the house and I dropped the luggage on the floor, and I says, Let me search you. I took her duster off, looked through all the pockets, and found nothing. Then I looked through

her dress pocket and searched her purse. There was nothing there. I looked in the rest of the luggage, even looked in the lunch basket, thinking by accident she might have opened the lid and dropped it in there. I asked her to rest a moment. She said, No; she wanted a drink of water, and I got it. We went over to Mr. Pickett's and sat down there a few moments. From there we went directly to depot. I stepped into the office, mother beside me. Mr. Smith wanted to know what was the matter. I told him mother was put off the train, and I says, Mr. Smith, are you sure that you gave mother the ticket? He says, "Yes, I am." I says, "Now, are you sure? There is something wrong." I don't or won't believe
72 she ever had her ticket; and he turned to mother and says, "Mrs. Fishburn, didn't I give you the ticket?" She says, "I think you did; I can't say." "Well," I says, "you never had your ticket." So he and I then had a few little words, and he refused point blank to search the office for the ticket. He said he had given it to her, and he knew he had. We then stepped out on the platform. There were several gentlemen there—Mr. Wiesbeck and several others. Mr. Wiesbeck said she had her ticket in her hand when she stepped on the car platform. I said he was mistaken. We searched thoroughly all up and down the track and through the weeds and under the railroad platform. We found nothing. Mother turned to Mr. Smith and says, "Mr. Smith, what about losing this ticket; have I got to lose it?" He said, "Certainly; it is the same as if you had lost the money;" and they had a few words. I was searching for the ticket. I didn't pay any particular attention to what was said. We passed from there home. It was between 6 and 7. After supper time I went over to the post office and I wanted to see about some mail; there related the story to the hardware man and an old conductor, who had also been a telegraph agent. He spoke up and said, "Did they put her off the train out on the prairie?" I says, Yes. He wanted to know where, and I told him. Well, he says, they ought to know better than that, the conductor had; and he said, Send a telegram to Underwood. I says, I don't know how to write one; I am too nervous to write. I spoke to Mr. Barlow. I says, Will you write one? He says, I can't; get this gentleman. I asked him then if he would. He said he would. He wrote, stating the plain facts of the case to him. I took it over to Mr. Smith, and I says, Mr. Smith, will you send this, stating the plain facts to Underwood? First he looked it over, and he says, no, I will not. He says, if I send that I send it at my own expense. I says, oh, no, you
73 don't; this company keeps their telegraph lines for just that purpose. He refused point blank to send it, and I says, Very well; hand it to me. I will return home. I haven't the money with me. I will write another one, stating to Underwood you refused to send this telegraph, and I says I will pay for them both, and then will see if they will go. If they cannot go from here I will go to Pipestone. I returned home. Mother was there when I got home, and I found her excessively nervous. She was pacing the floor and crying. I got her to set down, and tried to get her to be calm, and she said she couldn't. About 9 o'clock we re-

tired, and I had just got into a nice sleep and I heard her come back to bed. I wanted to know what was the matter. She said she had been up for a drink. I told her she must not get up again. She was shaking all over with nervousness. In about half an hour she said she wanted a drink, and I got up and pumped her a fresh drink. Along towards morning she got up and I gave her a dose of nitre and laudanum mixed. It seemed to irritate more than to do good. She was awake, as far as I can say, all night long. I don't think she slept any. I know I had very little sleep. I know while I was awake she slept none, for we was talking. On Friday morning I got up at 5 o'clock, thinking perhaps if she was alone in bed she could rest better. She seemed to fall into a slight doze. I got around and got the work done up and got breakfast ready, and about 9 o'clock, between 8 and 9, I called her. She got up and I helped dress her, and she came out and she sipped a little coffee. She couldn't do anything. She said she had no appetite; preferred cold water to anything else. She was very pale and hollow eyed, and seemed completely worn out. She sat down. I got her in the large rocking chair, and I done up my work, and then after-
74 wards sent the telegram. About 8 o'clock Mr. Smith came over, and I says, What news? He says, They say they will not hold themselves responsible for lost transportation. Well, I says, Did you send all the telegram? No, he says, I sent the part of it I thought necessary. I says, Very well. He returned at 10 o'clock. Then I was combing mother's hair, and he came and says, Mrs. Fishburn, you can go now. I says, How is that? We both spoke at the same time. He says, The ticket is found. I says, Where was it found? He says, In the safe with the twenty dollar bill. Why, I said, how is that? There must be some mistake. You are so sure you gave it to her. Well, he says, I guess I must have been mistaken. Well, I says, she can't go now. She is sick and nervous and she will not be able to go this week; is in no condition to travel alone. He says, Whenever she wishes to go it is ready. Time passed on. In the afternoon I couldn't keep mother quiet. She sent a telegram to her husband and wrote some letters to Freeport, and in the evening she kept getting worse and worse. She couldn't sit quiet. She couldn't lie quiet or she couldn't stand quiet. I had never seen her in such a state, and I was extremely troubled about it. I wanted to telegraph for the doctor and she wouldn't let me. There was no doctor in Edgerton, and she says you can do just as well as the doctor. I says if you are satisfied with my treatment I will do all I can. Through the night she rested a little better, I think, than she did the night previous, for I know I got a little more rest, so I came to the conclusion she had. But I was up and down off and on all night with her. Saturday morning she kept getting worse, and she got worse all day Saturday until evening. I was extremely frightened. She refused to let me telegraph for the doctor. Saturday night we went to bed about 8 o'clock. About 11 o'clock she called me, and when I awak-
75 ened I found her in a very hard nervous chill. I got up and done all I could. I asked her if she had had any

before; she said, Yes, she had had two slight ones; she lay in the chill until about 4 o'clock. I used hot water and cold water, rubbed her and gave her all the remedies I knew to give her; that is, I gave her more nitre, then valerian, then camphor, thinking if I could get her really warmed up it would stop. Along about 4 o'clock I got desperate and gave her an enormous large dose of laudanum. That quieted her down, and at 5 o'clock, when I got up, she was resting easy. She said she had no pain. I got up at 5 o'clock, and she fell asleep and slept very well until, as near as I could judge, after 9 o'clock. At 9 o'clock or a little after she awakened and called to me for a glass of water. I gave her a glass of water. I asked her if she didn't feel like getting up. She said if I helped her up she guessed she would get up. I helped her to get up and dress and into a large chair. She sat there and seemed perfectly overdone. I was very much frightend; I didn't know what to do, but towards evening she seemed to feel a little better, and through Sunday forenoon she had no return of the chills in particular. Once in awhile she said she would feel a slight chill and then it would pass away. So Sunday afternoon and evening she began to get a little better, and I coaxed her into eating a little something. Sunday night she rested after I gave her a dose of laudanum unbeknown to her. If she had known it she wouldn't have taken it from me. She slept pretty fair. Monday she felt a little better, but still quite prostrated from the effects of it, and Monday night she proposed going home the next day. She slept then with an opiate. Tuesday afternoon, when she was ready to start, she felt quite well. After the agent
76 was at my house and informed me that the ticket was found I was not at the office again before my mother started, and he did not point out to me in what manner he had found the ticket. My mother was not excited any more than was natural on such occasions; she wasn't as excited as either the agent or conductor was; the conductor was extremely excited. All hands seemed to be a little excited from the cause, it seems, of the train being late. I wasn't excited, or my mother wasn't, and the agent was not particularly excited. I knew the train had started when I was on it, and I sprang down, the brakeman helping me. I went back to the station after my mother returned to search for the ticket, and saw the agent; he seemed just as he always was, natural, at that time. I am positive that he refused to look in the office for that ticket. My mother didn't sleep well after this. I had been sleeping with her from April to July; I gave her five different doses of laudanum, and I gave her valerian, spirits of nitre, and I gave her camphor, and I gave her peppermint. I thought she had better have a doctor, but she thought otherwise, as there was no doctor there and it was too far to send for one. She started for home on the following Tuesday and went alone.

Interrogatory 1st. What is your name, age, occupation, and where do you now reside, and where did you reside during the months of July and August, A. D. 1884?

Ans. My name is A. D. Kingsbury; my age is thirty-nine years;

my occupation is a farmer and hotel-keeper, and reside at Edgerton, and resided there during the months of July and August, A. D. 1884.

Int. 2d. Do you know the plaintiff in this action named in the title of these interrogatories; and, if so, did you know her during the months of July and August, 1884?

Ans. Yes; and knew her in the months of July and August, 1884.

77 Int. 3d. Did you know of a railroad operated in the county of Pipestone and State of Minnesota during the months of July and August, A. D. 1884, under the name of the Chicago, Milwaukee and St. Paul Railroad Company; and, if so, through what part of said county did it run and in what direction?

Ans. Yes; the road strikes the west line of the county about nine miles north of the south line and takes a southeasterly direction to Edgerton, thence running northeast out of the county.

Int. 4. How many stations are on said railroad in said county? What was the names of said stations during said time?

Ans. There are four stations, Airlie, Pipestone, Hatfield, and Edgerton, going from west to east.

Int. 5. Which of said stations were in the east part of said county of Pipestone and which were in the west part?

Ans. In the east part Edgerton and Hatfield and on the west side Pipestone and Airlie.

Int. 6. How far east of said Edgerton station did the passenger and freight trains on said railroad run in the months of July and August, A. D. 1884?

Ans. I don't know.

Int. 7. To what points east of said Edgerton station did the company operating s'd road carry freight and passengers during the months of July and August, A. D. 1884?

Ans. I had traveled those months as far as Ramsey, Minnesota.

Int. 8. Were you on one of the defendant's passenger trains going east on the 24th day of July A. D. 1884, on or about said time when the plaintiff, Catherine Fishburn, was also on the same train passing and going east of said Edgerton station?

Ans. Yes.

Int. 9. Was said train stopped a short distance east of said
78 Edgerton station; and, if so, did anything occur to the plaintiff at the time said train was stopped? And, if so, state what did occur to her—state fully.

Ans. The train was stopped. Just when the train stopped I heard some talk in the car ahead of the one I was in. I got up and walked ahead. The conductor stood on the platform, and I saw Mrs. Fishburn on the ground. I also saw Mr. Pickett and Mr. Ask, of Edgerton, there, and I think there was a brakeman there. That is all I remember of seeing.

Int. 10. Did you have any conversatien with Mrs. Fishburn, the plaintiff, at the time of the said occurrence in the presence and hearing of the conductor of said train? And, if so, state fully all that

was said by yourself to Mrs. Fishburn and said conductor with reference to said occurrence?

(Objected to by defendant as incompetent, immaterial, and irrelevant, and further objected to because no foundation has been laid for the question and because the evidence sought to be introduced is hearsay.)

Ans. I told Mrs. Fishburn to come back and I would pay her fare. (Objected to.) I asked the conductor why he put her off. I told him that I would pay her fare. I think that was all I said to the conductor.

Int. 11. Now, please state what Mrs. Fishburn said to you and what the conductor said at the time of said occurrence.

(Objected to as incompetent, immaterial, and irrelevant.)

Ans. Mrs. Fishburn did not say anything. The conductor said that she had lost her ticket, and let her go back and hunt it, and that he was not going to keep the train there all day waiting for her. That was all he said that I heard or recollect.

Int. 12. If you did not engage in the conversation at the time of the said occurrence did you hear any conversation at the time
79 of said occurrence with others in the presence and hearing of said conductor or did you hear the conductor say anything in reference to said occurrence at the time thereof?

(Objected to by def't as incompetent, immaterial, and irrelevant.)

Ans. Mr. Ask and Mr. Pickett both offered to pay her fare; I do not remember anything further that was said.

Int. 13. Now look upon the paper marked "Exhibit A" and say if it is substantially a correct outline sketch or map of said Edgerton station and the railroad east of said station to where said occurrence happened.

(Objected to by def't as incompetent, irrelevant, and immaterial.)

Ans. Yes; that is something like it.

Int. 14. Is the plan on said map marked "Exhibit A" substantially correct as the place of the said occurrence?

(Same objection by def't.)

Ans. Yes.

Int. 15. What kind of a path was it from where plaintiff, Mrs. Fishburn, left the train back to Edgerton and over what did she have to travel to get back to Edgerton? State fully and particularly.

(Same objection by def't.)

Ans. There was no path; and if she followed the railroad she would have to walk on the railroad and have to walk over a trestle bridge of the railroad.

Int. 16. What kind of a day was it as to temperature and as to its

being clear or cloudy at the time the plaintiff walked back to Edgerton station, the said 24th day of July, 1884?

Ans. It was a clear day.

Int. 17. Is there a bridge over which said railroad passes between said Edgerton station and the place where said occurrence happened on said road? If so, give a description of the same as near as you can, stating its height, length, and width.

(Same objection by def't.)

80 Ans. There is a bridge there; its height is between ten and twenty feet, and its length is about 100 feet long, I should judge; I do not know its width, but suppose that it is the width of all railroad bridges.

Int. 18. Was this bridge there at the time of the said occurrence, and by what means could a foot passenger pass over said bridge, and on what would he have to walk?

(Same objection by def't.)

Ans. He would have to walk on the ties; the bridge was there then.

Int. 19. What was the condition of the said conductor at the time of the said occurrence in his manners and mode of acting?

(Same objection by def't.)

Ans. The conductor seemed to be rather out of humor; I noticed nothing else.

Cross-examination:

C. Int. 1. Did you see the plaintiff on the train prior to the time you saw her on the platform of the car forward of the one in which you were?

(Objected to as incompetent, irrelevant, and immaterial by pl'ff.)

Ans. I did not see her on the platform; the first I saw of her she was on the ground.

C. Int. 2. Did you hear any conversation between her and the conductor before the time you came out on the platform and saw her on the ground?

(Same objection by pl'ff.)

Ans. I heard talk, but do not know what it was about.

C. Int. 3. Did you hear any conversation regarding the cause of her coming out of the car before you saw her on the ground between plaintiff and conductor?

(Same objection by pl'ff.)

Ans. No.

C. Int. 4. Did you know at the time or do you know now of your own knowledge, aside from anything that you have heard, as
81 to what the trouble was?

(Same objection by pl'ff.)

Ans. No.

C. Int. 5. Where did pl'ff get aboard of train?

Ans. I think I saw her get on the train at Edgerton.

C. Int. 6. Were you in the same car at any time with her?

(Same objection by pl'ff.)

Ans. No.

C. Int. 7. Did you see Mrs. Fishburn step off the platform of the car to the ground?

(Same objection by pl'ff.)

Ans. No.

C. Int. 8. Did you see the conductor or any of the brakeman have hold of her or appear to be putting her off the train?

(Same objection.)

Ans. No.

C. Int. 9. Did you hear any one order her to get off the train?

(Same objection.)

Ans. No.

C. Int. 10. Did you hear the conductor or any of the brakeman use any loud or ungentlemanly or abusive language to the plaintiff?

(Same objection.)

Ans. No.

C. Int. 11. If there had been any such language used while the conductor was on the platform would you have heard it?

Ans. It would have depended on how loud they talked; I am a little hard of hearing.

C. Int. 12. Did you see any violent or ungentlemanly conduct toward her on the part of the conductor or any of the brakemen?

(Same objection.)

Ans. No.

C. Int. 13. Did you state in your direct examination everything that you heard the plaintiff or the conductor say at the time?

Ans. Yes; as near as I can remember.

C. Int. 14. Did you hear Mrs. Fishburn say anything in reply to the offer of yourself or Pickett or Ask to pay her fare?

Ans. No.

C. Int. 15. Did you hear the conductor say anything in reply when these offers were made?

Ans. Nothing except what I have already stated.

82 C. Int. 16. Was the train at a standstill during all this time?

Ans. I think it was.

C. Int. 17. Do you know of your own knowledge what course the plaintiff took or what she did after the train went on?

Ans. No.

C. Int. 18. Do you know how long the train stopped there?

Ans. About a minute; possibly two minutes.

C. Int. 19. Could the plaintiff, by going east on the railroad track a short distance and then south, strike a highway leading back to the station of Edgerton without difficulty?

Ans. She could go that way by going around a little further; that would avoid going across a trestle bridge.

Redirect:

Int. 1. How far back and to what distance would a person have to travel to reach the highway, and would a person who is not acquainted with the surrounding fields be apt or likely to go back to said highway to reach Edgerton from said place of occurrence?

(Objected to as being incompetent and irrelevant and immaterial and as calling for the opinion of the witness.)

Ans. A person would probably have to go about 40 or 50 rods. A person would be likely to go across the railroad bridge.

Int. 2. How long have you resided in the village of Edgerton?

Ans. About eight years.

Int. 3. Do you own any real estate in the vicinity of the occurrence?

(Same objection.)

Ans. Yes.

Int. 4. How much baggage did the plaintiff, Mrs. Fishburn, have with her while on the ground at the place of said occurrence?

Ans. She had some; I do not know how much.

Deposition of A. R. Burkdall.

83 My name is A. R. Burkdall; age, 34 years; my occupation is editor, and reside in Edgerton, Minnesota, and have resided there about two years and a half. I was residing there during the months of July and August, A. D. 1884. I know the plaintiff, Catherine Fishburn; have known her about two years. I knew her during the months of July and August, A. D. 1884. I know Conductor Thomas, in the employ of defendant. To the best of my recollection, he was in the employ of the defendant during the months of July and August, A. D. 1884. I know of the occurrence to Mrs. Fishburn on the 24th day of July, A. D. 1884, near Edgerton station, on defendant's road. I understood that Conductor Thomas was in charge of the train that plaintiff's occurrence took place.

Int. 1. Did you have any conversation a day or two after the happening of the occurrence with the said conductor in reference to the said occurrence; and, if so, what was said — conversation of the said conductor to you? State the same fully, as near as you can recollect.

(Objected to as incompetent, irrelevant, and immaterial, and because the question does not call for that which would be a part of the occurrence or the *res gesta*.)

Ans. About two weeks after, on the train which Conductor Thomas was in charge, for my own information, I asked him concerning the occurrence referred to, and we had a conversation of about five minutes' duration. I asked him how it happened, and he told me that Mrs. Fishburn had got on his train at Pipestone on the day of the occurrence with a ticket, I think, for Edgerton, and she asked him somewhere between Pipestone and Edgerton if he, Thomas would stop the train long enough to buy a ticket farther east.
84 He told her that he would, and upon reaching Edgerton the acquainted the agent of what they wanted. He told me that he went into the office at Edgerton to see her buy a ticket. I asked Mr. Thomas if he saw her get the ticket, and he said that he did not, but saw her handing some money to the agent and asked for a ticket. After he supposed that she had got the ticket he told her to get on board as soon as she could and saw her get on, and when he called for her ticket after the train was in motion she could not find it. She told him she could not find it, and supposing that she had lost it he told her that she had better go back and hunt it. I do not remember whether he stated that there was anything said about paying fare or not. He told me that he stopped the train and let her off. I do not remember whether he used the words "let her off" or "she got off." He told me that some persons on the train offered to pay her fare after she got off, but he said to me, as the train was starting, he did not want to keep the train there any longer; that she had lost her ticket and was going to hunt it, and that he told these parties that she was going to hunt her ticket. He told me that he was somewhat put out about the matter, because he had delayed the train at Edgerton for her to buy her ticket, and that she had plenty of time to do it. That is all I recollect of his having told me.

Cross-examination:

C. Int. 1. When and where did you have the above conversation with the said conductor?

Ans. I should think that it was about two weeks after the occurrence referred to, and on the train between Pipestone and Edgerton. I know nothing personally about the matter.

Deposition of C. W. Ask.

My name is C. W. Ask; my age is 29 years, and I reside now and have resided in Edgerton, Pipestone county, Minnesota, for
85 the last five years, and resided there during the months of July and August, A. D. 1884. I know the plaintiff, Mrs. Fishburn, and knew her during the months of July and August, A. D. 1884, and knew her a year prior to that time. I know of the defendant's line of railway located in Pipestone county, and that defendant operated it in July and August, A. D. 1884.

The railroad strikes the county about the center on the west side and runs in a southeasterly direction to Edgerton and makes a curve running northeast to the county line in this county, and there

are four stations on the line in this county, vis., Aitlie, Pipestone, Hatfield, and Edgerton, Aitlie and Pipestone being in the western part of the county and Hatfield and Edgerton being in the eastern part of the county. These stations were on the line in July and August, A. D. 1884. As far as I have occasion to know, the defendant operated their road as far east as La Crosse, Wis., from Edgerton. I was on one of the defendant's passenger trains going east from Edgerton on the 24th day of July, 1884, and was on the same train that Mrs. Fishburn, the plaintiff, was on on said day. Said train was stopped east of Edgerton station on said day a short distance. The first that I saw the train began to stop; started up again, and then stopped. I was standing up in the car behind the one that plaintiff was in and was in the front part of the car. The doors of the passenger cars were open clear through the train, and it was a very warm day. A minute or two before the train stopped I saw the plaintiff talking with the conductor. They were both standing in the center of the car in which they were, and as the train slackened up they moved to the front of the car.

86 After the train stopped I went forward on the front end of the next car ahead of me to see what the trouble was. I went clear through that car and out on the front platform, and when I got there Mrs. Fishburn was on the ground. The conductor was standing on the platform. Mr. Kingsbury and Mr. Pickett came there right after me and stood on the platform. Mrs. Fishburn had some baggage with her; some of the baggage was in her hand and some was on the ground. I believe there was three or four packages.

Int. 1. Please state what you said to Mrs. Fishburn at the time of the occurrence.

Ans. I do not recollect of saying anything to her.

Int. 2. What did you say to the conductor in reference to ths occurrence?

Ans. I asked him what was the matter and offered to pay her fare.

Int. 3. What did the conductor say to you in reference to this occurrence?

Ans. He said that she had no ticket and that she had to get off the train, and that he did not have time to bother with her. That is all the conductor said to me.

Int. 4. Please state what was said by others to the conductor or Mrs. Fishburn in reference to the occurrence in their presence or hearing.

Ans. I heard Mr. Pickett offer to pay Mrs. Fishburn's fare if she did not have the money. She made some reply, but I could not make out what it was. I have examined "Exhibit A," and it is a fair sketch or map of the defendant railroad running from the station of Edgerton to the place of occurrence. I know that there is a trestle bridge between the station of Edgerton and the place of occurrence over which the plaintiff would have to cross to return to the station of Edgerton on the railroad track and would have

87 to walk on the ties of the track, there being no other path,

and in passing over the bridge she would have to step on the ties of the bridge, there being no foot-path. The bridge is from 100 to 120 feet long and about 20 feet high, and I should think about 10 or 20 feet wide. The day of the occurrence was clear. I do not know what time in the afternoon it was. Judging from his, the conductor's, speech, I should think he was vexed at the time of the occurrence.

Cross-examination:

I have stated in my direct examination all the conversation I heard at that time on the part of the conductor and Mrs. Fishburn.

C. Int. 1. Did you hear the conductor or any of the brakemen at any time use any loud, ungentlemanly, or abusive language to the plaintiff?

Ans. No.

C. Int. 2. Did you hear the conductor or any of the brakemen at any time order or tell the plaintiff to get off the train?

Ans. No.

C. Int. 3. Did you see the conductor or any of the brakemen at any time take hold of the plaintiff and put her off or attempt to put her off the train?

Ans. No.

C. Int. 4. Did you hear the plaintiff at any time make any objections to getting off the train before or after she was off?

Ans. No.

C. Int. 5. Did you see the plaintiff on the train after leaving Edgerton station before the time you saw her talking with the conductor in the car ahead of you?

Ans. No.

C. Int. 6. Did you hear any of the conversation between her and the conductor while she was on the train?

Ans. No.

Int. 7. Did you hear any conversation between her and the conductor regarding the cause of her leaving the train before you saw her on the ground?

88 Ans. No.

Int. 8. Did you know at the time or do you know now of your own knowledge, aside from anything you have heard, as to what the trouble was about?

Ans. No.

C. Int. 9. Were you at any time in the same car with the plaintiff?

Ans. No.

C. Int. 10. Did you see the plaintiff step from the car to the ground?

Ans. No.

C. Int. 11. Did you see any violent or ungentlemanly conduct on the part of the conductor or any of the brakemen toward the plaintiff at any time?

Ans. I saw nothing, except what I have already stated.

C. Int. 12. At the time of this occurrence was the train at a standstill?

Ans. Yes.

C. Int. 13. Do you know of your own knowledge what course the plaintiff took or where she went after the train started on?

Ans. Yes; I saw her walking back on the track toward Edgerton station.

C. Int. 14. When you came to the front platform of the car in which she had been riding was she then standing on the ground?

Ans. Yes.

C. Int. 15. Have you stated all you saw or heard at the time with reference to this matter?

Ans. Yes.

Redirect by pl'ff:

R. Int. 1. Were you at any time before you saw the plaintiff on the ground able to see all that took place between the plaintiff and the conductor at the time of the occurrence?

Ans. No; not all the time, because there was some passengers standing up in the aisle of the car ahead of me.

R. Int. 2. Did you say in the 11th C. Int. that there was any ungentlemanly or improper conduct by the conductor toward
89 the plaintiff at the time of the occurrence?

Ans. I answered that I saw nothing but what I had already stated.

R. Int. 3. Did you not consider the conductor's conduct toward the plaintiff ungentlemanly, rude, and improper at the time of this occurrence?

Objected to; objection sustained; exception by the plaintiff.

Ans. Yes; I did; from the fact of his having her leave the train.

Recross ex.:

R. C. Int. Did you know then or do you know now that the conductor required or compelled her to leave the train?

Ans. No.

Whereupon the said plaintiff, to further maintain the issue on her part, produced as her third witness—

S. A. PICKETT, sworn for the plaintiff:

I reside in Edgerton, Minnesota, and have for five years. I know the plaintiff and have for three years. I was on the defendant's train on July 24th, 1884, and saw Mrs. Fishburn. I took the train that day for St. Paul; it was a little behind time, I believe. Soon after it left the station it began to stop, slacked up, and almost stopped, pulled along a little ways farther and then stopped. I got up into the aisle and saw a commotion in the car ahead of me. The train was open clear through; it was a very warm day, and the doors were all open. I don't know as I could state how I got the impression that Mrs. Fishburn was concerned in the matter; whether

parties told me or whether I saw it myself I could not say, but I hurried to that end of the train, to the car that was ahead of me, and when we got there—when I got there—Mrs. Fishburn was on the ground with her baggage. I spoke to the conductor of the
90 train and asked him what was the matter. In a hurry and, I think, in the same breath I spoke to Mrs. Fishburn and asked her what was the matter, and I think the only reply she made me—her baggage, I think, was on the ground. I hollered and told her to get on and we would pay her fare or I would pay her fare; I don't remember just how it was worded, but gave her to understand that I would pay her fare. Mrs. Fishburn made the motion as if she was going to pick her baggage up and stopped and says, "I don't know what to do." The conductor says, "She has bought her ticket and left it laying on the desk in the depot," and says, "Let her go back and find it." For fear it was not understood I says, "We propose to pay her fare," and I don't remember whether the conductor replied to that or not. His hand was on the bell-rope, and he pulled the bell and the train pulled out and left Mrs. Fishburn on the ground. I was on the forward end of the rear car and the conductor was on the rear end of the forward car, on adjoining platforms. The conductor appeared to be mad, short, did not give me any answer only just what I have stated; I think only one answer; he might have answered twice, but I think not. In speaking about Mrs. Fishburn's going back he was short and decisive; that was all; he appeared to be very much excited; at least I think he was mad. I had no occasion to know what his provocation had been. The train had just got across a long trestle bridge, I should think 100 or 120 feet in length, and I think it was 20 feet from the water to the track at least. It was a trestle bridge; nothing but ties. I should think the ties would not be over a foot apart. It was over 100 rods back to Edgerton, I think; not quite half a mile. I think a stranger left where she was would go back across the railroad bridge. The road-bed there was an embankment. The
91 embankment next to the bridge would probably be 15 feet high. I could not say how far they were from the bridge. I think it was less than 30 rods from where she was back to the railroad bridge. I think, to be safe, it was 15 rods from where they stopped the train back to the bridge. At the point where Mrs. Fishburn was put off on the north side there is a hill, which is the side Mrs. Fishburn was put off on, and there is quite a ditch between the track and the hill; on the south it slopes right down from the track into a slough of water. There is a highway some fifteen or twenty rods south of this. By going east 30 or 40 rods she could have gone east onto the highway.

Cross-examination:

I was in the car behind the one Mrs. Fishburn was in. I saw a stir in the car, but could not hear anything that was said. When I got to the platform the train was stopped, and Mrs. Fishburn was — off. I don't know what occurred before that. When I came out of

the car I said to Mrs. Fishburn to get on the train and I would pay her fare if she had not means with her. She made a motion as though she was going to pick up the baggage, or some kind of motion, and stopped and said, "I don't know what to do." That is all I heard her say. The train was standing still at this time. The offer I made to pay her fare was if she did not have means to pay her fare I would, and that is all that I heard her say. I think she did not say anything to the conductor at that time, and that was all I said to the conductor. I told him she was all right and I would pay her fare if she had no means. That was all the conversation, I think. The conductor said to me she had lost her ticket and she would go back and get it. I have stated all I saw or heard. She
92 was standing in a safe place on the ground, away from the track. It was dry. I did not see the conductor or the brakeman take hold of the plaintiff to put her off or attempt to put her off. I did not hear the plaintiff make any objection to getting off the train. I heard no conversation between her and the conductor regarding the cause of her leaving the train before I saw her on the ground. I did not know what the trouble was about. I was not in the car with her at any time. I saw no violent or ungentlemanly conduct on part of the conductor or brakeman toward the plaintiff at the time unless it could be construed to be ungentlemanly—his reply to me.

Q. You think he was decisive?

A. Yes, sir; very decisive indeed.

Redirect examination:

The answer of Mrs. Fishburn that she didn't know what to do was just after the conductor's answer to me that she had lost her ticket and must go back and hunt it. That seemed to cause her to make that reply. The time spent there was very short—possibly two minutes.

MARIE A. BAKER recalled for further cross-examination:

I know Mr. and Mrs. Thayer. I had an interview with them something a year after the occurrence. I had a statement with me of the facts in the case as I understood them. I asked them if they could swear to anything in the statement. I have not got the statement now. I destroyed it only yesterday, not knowing or supposing it would be of use to us now. I had it in my pocket and it got soiled, and I asked mother if she thought it would be of any account, and she said no, and so I destroyed it. I asked Mr. Thayer, after reading it over, if he could testify to anything therein contained, and he said he could not. I then went to the agent at Howard and telegraphed, "Unfavorable. They know nothing." I meant that they
93 knew nothing because they stated to me that they sat at the rear end of the car, so far from this affair that they could hear nothing that was said whatever.

Q. Isn't this the telegram: "To B. Dunwiddie; Unfavorable heard nothing. Marie A. Baker."

A. No, sir.

Q. You are positive of it, are you?
A. Yes, sir; I am quite positive of it. I may be mistaken, but I am very sure I am not.

Redirect examination:

The written statement I carried out there was written by Mr. B. Dunwiddie, of Monroe, Wisconsin. I got it from him and carried it there with instructions that if they could testify to anything we would take their depositions, and the arrangement was that the answer should be — if they could not testify to anything "unfavorable." I added that "know nothing." The operator wrote the telegram for me.

Whereupon the plaintiff, to further maintain the issues on her part, called B. DUNWIDDIE, who, being duly sworn, testified as follows:

I am the attorney for the plaintiff and reside at Monroe, Wisconsin. I first conferred with her in regard to this case when I met her at Galena on professional business. She came from Minnesota. On her first arrival she told me her case. I explained to her that I was already acquainted with the company and would go out there and see them in a day or two as soon as we got through with our business. At her request I went out and saw the head office. I went to Galena to meet her to attend to some professional business in court. She was to meet me there a day or two before, but did not come until Wednesday evening, and explained as to her delay—this accident—and stated her case to me. I then went to Milwaukee to see the company and laid before them substantially the——

Objected to.

COURT: I do not see what the purpose of this is.

94 DEFENDANT'S ATTORNEY: The purpose is simply to show that he went to see them to have them do something about it, and they refused.

COURT: I do not suppose that is important at all; they are not obliged to make any demand.

Exception by plaintiff.
Plaintiff rests.

Defense.

Whereupon the defendant, to maintain the issues on its part, called E. H. THOMAS, who, being duly sworn, testifies as follows:

I am a conductor on the Milwaukee and St. Paul railroad, and have been seventeen years a conductor, and in the employ of the defendant company as conductor five years last May; have been passenger conductor two years on the Southern Minnesota Division. In July, 1884, my run was from Wells, Minn., to Woonsocket, Dakota, and passed through the towns of Pipestone and Edgerton. I was in charge of train No. 4 on the 24th of July, 1884; the train was

going east. I recognize the plaintiff, but have no acquaintance with her whatever. The first time I ever saw her was immediately after leaving Pipestone. She aske- me or told me that she wished to proceed on the train and wanted to know if I would stop the train long enough at Edgerton for her to buy a second-class ticket to Chicago, & I told her I would. The ticket she had only read to Edgerton. We arrived at Edgerton at 4 o'clock. I immediately stepped off when the train stopped, and, I think, Mrs. Fishburn stepped off at the same time, and I told her to step into the depot and I would send the agent to sell her a ticket. The agent at this time was *at this time* at the express car at the front end of the train attending to his express matter. I told the agent there was a lady in the ticket office waiting for a ticket to Chicago, and for him — "as quick as you get done here." Says I, "Go
95 and sell the lady a ticket and we will tend to putting the baggage on." I assisted in putting the baggage on and was not in the ticket office with the plaintiff at any time. I was there about 4 minutes or 5 minutes. I think we were about 4 minutes late out of there. When I saw the lady come out of the ticket office I hollered "all aboard." I did not call "all aboard" before she came out of the ticket office. I saw her get on the train and Lorrain Tenney, the brakeman, assisted her. After we got started I went into the car to gather up the ticket-, going into the head car first, where I saw Mrs. Fishburn. She was in the third or fourth seat on the south side of the coach and was the first passenger in the car. She appeared to be doing something either with her pocket-book or a little hand satchel or something she had. She appeared to be fumbling in her pocket or something of that kind before I got to her. I came up the seat for her ticket; she appeared to be looking for her ticket or something, I don't know what, and she says, "I can't find my ticket; I think I have lost it," and say I, "We may find it on the floor." She stepped out of the seat into the aisle and I looked around there myself for the ticket and she looked and she couldn't find it, and she says, "It is lost; what will I do?" Says I, "If I was in your place and had bought a ticket to Chicago I would get off and go back and try to find it." Says I, "Your daughter may have the ticket; she was in the ticket office with you; very likely you will find the ticket by going back, or you can go on to Fulda and buy another ticket from there to Chicago." Fulda is 29 miles east of Edgerton. I told her that if I was in her place and had bought a ticket to Chicago I would go back and try to find it; that I thought maybe her daughter might have it, as she was in the ticket office with her, but if she wished to go on she could go to Fulda
96 and buy another ticket there from there to Chicago and it should not cost her anything to go to Fulda.

Q. What reply, if any, did she make to that statement?

A. Well, she at that time — when I told her this; then I reached up and pulled the cord, and she said she would go back and find her ticket and I stopped the train. I pulled the cord just after this talk. I had been assisting her in looking for her ticket; I looked under the seat, under the cushions, and she was all this time look-

ing through her pockets or clothes. There were some 8 or 10, possibly a dozen, other passengers on the car; some immediately in the vicinity of where Mrs. Fishburn sat. When I pulled the signal to stop the train slacked up, and I suppose the engineer—I didn't know that he was on this bridge, you know, or near it—he saw he was going to stop right on this trestle and he pulled out again, and as he started to pull out I pulled the cord again and the train came to a full stop at the east end of the bridge, with the rear end of the train probably not over a couple of rods from the rear end on the bridge. She was in the forward coach; that would probably make 100 feet. The coaches are 50 and 55 feet long. When the train stopped the brakeman took the baggage and carried it out and she walked out and I walked out behind her and we helped her off the train. I told the brakeman to assist the lady in getting her baggage off, the brakeman assisted her down to the ground, and I told her to remain right where she was until the train pulled out of her way and then she could take the track and walk back to Edgerton. I did not take hold of her or push her off or touch her at all. I did not order her to get off nor use any loud or boisterous language toward her and did not have my hands upon
97 her as she walked out towards the platform, and I had no knowledge of the plaintiff's health or condition at the time. After she was off those gentlemen came through the car and said, "Don't put that lady off; we will pay her fare"—something to that effect. I did not know the gentlemen; they had got on at Edgerton. At this time I was standing on the platform of the baggage car. Mrs. Fishburn and the brakeman were on the ground, these gentlemen were on the platform of the coach, and the train was at a standstill. I told them the lady did not wish for anybody to pay her fare, that she had lost her ticket and wished to return back to the station to find it. Mrs. Fishburn did not say anything after those offers to pay her fare were made; she did not at any time request me to carry her on; she did not at any time offer to pay her fare; she did not at any time request me to accept the money from any of these passengers on the train. The train did not remain at a stand-still probably over a minute. I do not remember using the language to the brakeman, "Get your baggage and get off the train," to which Mrs. Fishburn has testified, and I did not use any such language and did not tell her that she must get off the train. It was probably not over a minute or a minute and a half after I came to her for her ticket before I pulled the bell-cord the first time to bring the train to a stop. We were out somewhere between a quarter and half a mile when the train stopped. During that time I was engaged with Mrs. Fishburn in searching for the ticket. It is my duty, under my instructions, to call for the ticket of a passenger after they take passage upon trains, and I did it in this case. Where Mrs. Fishburn got down on the ground there was plenty of room to stand, and it was dry. We were about 4 or 5 minutes late
98 leaving Edgerton. I had never seen or known Mrs. Fishburn prior to that day. I heard nothing of the kind testified to by Mrs. Baker that she told me her mother was suffering from rheum-

atism. I had no knowledge of her condition. Mr. and Mrs. Thayer, of Howard, Dakota, were in the same car with Mrs. Fishburn and sat behind her on the opposite side of the coach, near the center of the car; they could not have been over 4 or 5 seats behind her.

Cross-examination:

I don't know what time I left Pipestone that day, as I haven't got the time card; I don't remember what the usual time for leaving was then. We left Pipestone on time; all the time we lost was at Edgerton waiting for this lady to get her ticket—about 4 or 5 minutes in waiting for this lady and doing our other business that we had to do, taking off the baggage and putting it on and taking off the express, etc. It generally takes from three to five minutes.

Q. Suppose the ticket had been lost, what could have been done to prevent its being used?

A. Why, you could telegraph to all the conductors along the line of the road not to accept it for passage if it was offered, give the number of the ticket, etc., and it would be their duty to look for that ticket and see that they did not take it.

Q. You could have used means by which the company could not have been imposed upon?

A. Yes, sir; if her ticket was a first-class ticket it would have been good as long as the road lasts or until it was used. If her ticket was as she claimed to me she wished to purchase, a second-class ticket, those are a limited ticket and cannot be used after the limit runs out. I don't know what the limit is from Edgerton to Chi-
99 cago; probably two days; maybe three; if it was second-class. It could be used by any person who happened to have it on any train before it run out.

Q. But by using the facilities and using the means you have stated the company could protect themselves from imposition?

A. Well, they could in a measure, although this ticket might accidentally get used before they got their notices around. The first telegraph station east of Edgerton was Fulda, 29 miles. As I went through the train that day I didn't find anybody but what had paid their fare or had tickets or a pass. I don't think anybody else got on at Edgerton that day for Chicago or any point that way. The next train east from Edgerton would be the next afternoon at 4 o'clock.

Q. Didn't Mrs. Baker ask you to assist her mother about changing her baggage?

A. I didn't hear any conversation of the kind, sir. It takes from two to three minutes for my train to get under full head, which would take us pretty near half a mile. Our running time was 21, 22, or 23 miles an hour, probably. We were searching for her ticket for a minute or a minute and a half. After we started I stood on the platform until we got to the switch or somewhere near there.

Redirect examination:

I received a message from the agent to search the coach for that ticket. I did, and notified him I couldn't find any ticket.

Q. Do you know of your own knowledge whether Mrs. Fishburn had actually purchased a ticket?

A. I didn't see the transaction; no, sir. She could have purchased a ticket at Fulda; there were facilities there for purchasing tickets for Chicago and all points.

100 Whereupon the defendant, to further maintain the issues herein on its part, produced LOREN TENNEY, who, being duly sworn, testified as follows:

My business at present is picking turkeys when I am at home. On the 24th day of July, 1884, I was a brakeman on the train of the defendant, of which Conductor Thomas had charge. I saw Mrs. Fishburn on the train that day. I saw her at Pipestone when she got to the train and at the depot at Edgerton. I next saw her in the middle coach after we had pulled out of Edgerton. I first went into the baggage car and then into the coach. Mrs. Fishburn was sitting on the south side of the coach, about four seats from the front end, and Mr. Thomas was standing right in front of her. They acted as though they were looking for something. I asked Mr. Thomas, "What are you looking for?" Says he, "This lady has lost her ticket;" that was all he said to me. I looked in under the seats myself—kind of looked around. He kind of straightened up and said, What are you going to do? She says, I don't know. He says, My advice is to go back and see if you can't find your ticket. Says he, Your daughter may have the ticket. They were both searching for it when I first saw them. The conductor didn't pull the bell until after I got in there. He pulled it right after he had that conversation with her about going back to see if her daughter didn't have the ticket. All the reply she made to his remark was, "I don't know." After the conductor pulled the rope he said, "You assist this lady in getting off." I took her baggage and walked off toward the front end of the car, this lady following me and Mr. Thomas in the rear of her. The train slacked up on the *on the* end of the bridge, and then it pulled across; then he pulled the cord
101 a second time. They stopped as soon as they got across, and I stepped off with the baggage. I took two of her bundles and walked out with them, and as the train stopped I jumped off and assisted her onto the ground. Then she stepped down and I lifted her off onto the ground. The conductor was standing then on the rear end of the baggage car. The conductor did not have hold of her at any time that I saw. He did not order her off the train or tell her she must get off, nor say in her presence, "Get your baggage and get off the train." The train was at a stand-still very near a minute—about that length of time. All Mr. Thomas said to her as she stood on the ground was, You stand right there until the train passes by, and you can go down the track. I did not hear Mrs. Fishburn make any remark while she stood on the ground. After

she stood on the ground those gentlemen came forward, and one of them spoke up and said, "You needn't put that lady off. We will see that her fare is paid." I don't know who said that. It was addressed to the conductor. The conductor said, "No, sir; she don't want anybody to pay her fare. She is going back to look for her ticket." She did not say a word at that time. I heard no other gentleman make any remarks. The train then started up. The place where she was helped off was perfectly dry and there was plenty of room for a person to stand there. It was about 70 or 80 feet from the end of the bridge. Mrs. Fishburn & the conductor were looking for the ticket after I got in the car; not over a minute before the conductor pulled the cord. I heard no loud or ungentlemanly language on part of the conductor. He appeared just as he always does, and wasn't a particle excited as I could see. I noticed nothing unusual in his conduct.

Cross-examination:

102 I had been with Mr. Thomas about two months at that time. There was no other brakeman on the train. I assisted Mrs. Fishburn on to the train, and when the train started out I got onto the baggage car and helped the baggageman put up his baggage. I don't remember exactly the number of pieces of baggage put on at Edgerton. I think there were two or three pieces. I helped put it on and the conductor helped. It didn't take us but maybe a minute and a half or two minutes to throw it on. It was checked. After I went in the baggage car I staid maybe three or four minutes before I went back. I was in the baggage car all the while the train was in motion. When I went back into the car where Mrs. Fishburn was she was sitting down. The conductor was standing in the aisle ahead of her. They were kind of bent over looking. She was kind of bent over as if she was looking for something. I asked him, "What are you looking for?" He says, "This lady has lost her ticket." I passed around behind her and looked under the seats. The conductor stood there. He kind of straightened up and asked her what she was going to do. She says, "I don't know." He said, My advice is for you to go back. Maybe your daughter has got the ticket. She didn't say anything to that. He reached up and pulled the bell-cord and told me to assist that lady in getting off the car and take her baggage. I took it and walked out. I was just going through the door when the train slacked up on the bridge. Then it pulled up again, and I staid out of the door until it slacked up again. I did not look back after I started out, and I don't know whether he took hold of her or not. I couldn't say as he did. As soon as the car stopped I got off with the baggage. I did not take all her baggage. She carried a piece herself, I think. I had two parcels, one in each hand.

Q. What did she say after she got off?

A. Didn't say a word.

103 Q. What did the conductor say to her after she got off?

A. The conductor didn't say anything to her.

Q. What did those gentlemen say?

A. One gentleman spoke up and said, "You needn't put that lady off, we will see her fare is paid."

Q. What did she say then?

A. She didn't say anything.

Q. What did the conductor say? Use his words.

A. Why, said he, "She didn't want anybody to pay her fare, she is going back to look for her ticket." He did not say she has left her ticket on the counter and has got to go back and hunt it. I do not claim to remember the exact words. Mr. Thomas is not easily excited. I never knew him to get into a flurry when I was braking for him. I saw a lady there on the platform that day. I told her twice that the train was going to go. I seen the conductor give the signal. The conductor hollered to me, says he, "Tell that lady if she ain't going on the train to get off, as we are going to go."

Redirect examination:

I would not undertake to give the exact time. I was in the baggage car before I went into the passenger coach.

Recross-examination:

I have given my best recollection.

Redirect:

I was with Mr. Thomas a little over six months.

Whereupon the defendant, to further maintain the issues herein on its part, produced ROBERT A. SMITH, who, being duly sworn, testified as follows:

I am station agent at Edgerton, Minn., and was July 24th, 1884. I know conductor Thomas and the plaintiff, Mrs. Fishburn, and saw her on that day about the time No. 4 left the station. When the train pulled into the station I was out where the express car usually stopped, with a mail-sack and my express matter in my hand; the conductor came toward me and said that there was a party back there wishing to get a ticket for Chicago. I went into the office as soon as I could, and Mrs. Fishburn came to my ticket
104 window and asked for a second-class limited ticket for Chicago. I issued the ticket and she gave me a twenty dollar bill; the ticket was thirteen dollars and something. I gave her the change and put the twenty dollar bill she gave me into my safe in the money drawer. When I issued the ticket I had to write the destination in it, also Edgerton, Minn., stamp it, and cancel the limitation. The limit of the ticket was three days from date. She took her change, left the depot, and boarded the train. I picked up a parasol and another parcel and run out to the train, and asked her if it belonged to her, and she took it. About 30 minutes later she came back to the depot. The train left that day at 4.15, its regular time was 4.10. When she came with her daughter to the station she said she had lost her ticket, and we proceeded to look for it, but didn't find it. She then went home. In the evening her daughter

came down with a message which she wanted me to send to our supt. I told her I could not send it deadhead, as the rules didn't allow it. I told her I would send one in my own name, and that would answer the purpose. I think she consented to that. I sent one message to Thomas, asking him to look in the coach for the ticket, and one to our division supt., asking him if there was any way to get the woman to her destination without paying her fare again, stating to him the circumstances of the ticket being lost. Mr. Underwood answered, "Make no concessions in cases where parties lose their transportation." The next morning, when I went to my money drawer in my safe to get my change, I found the ticket in the drawer. The circumstances were these: I went there the next morning after some change, and the first thing that was on top was the twenty dollar bill that she had given me, and I took that up with some other paper money to get hold of some
105 silver, and there was the ticket. The ticket was right under the twenty dollar bill. I had not known it was there prior to that time. I immediately took the ticket up to Mrs. Fishburn and told her that I had found the ticket and that I would issue her a new ticket or refund her the money. I believe she said she would let the matter rest for the present. She came when she got ready to leave and bought a ticket for Dubuque. There was a little difference between the price of the tickets. I don't know which way it was, but whatever the difference was it was adjusted. The ticket she bought could have been used by any person into whose possession it came within the three days. I was positive I had given her her ticket. I wasn't excited at all on that day. I hadn't any reason to be excited. There was p-enty of time there to issue a ticket; no excitement at all on my part. The usual length of time for the train to stop there was about two minutes. My usual duties when the train was in was to attend to the express car, mail car, and baggage car. I did not notice anything unusual about the conductor that day, only he was trying to hurry matters up as much as possible, so as not to be delayed. I have known Mr. Thomas three or four years.

Cross-examination:

Mrs. Fishburn was at my ticket window when I went into the office, and her daughter was with her. I heard Mrs. Baker say, "Hurry up." I don't know whether she meant me or her mother; I suppose her mother. I think it was after I handed her the change. I know she said hurry up after I picked up the parasol and another article that was there. Conductor Thomas didn't go into the office with me. Anyhow, I didn't see him. Afterwards, after the suit had been talked of—probably in August or September—I wrote a letter to H. Hinsey, stating the details of the matter.

106 Q. The matter was fresher in your recollection then than now, was it?

A. Very likely it was.

Q. Mr. Hinsey is the special agent looking up these things for the company?

A. Yes, sir.

Q. Did you write to Mr. Hinsey that "on July 24th Mrs. Kate Fishburn got off train No. 4, and in company with Conductor Thomas came into my office and called for a ticket to Chicago, which I issued and gave her?"

A. Yes, sir; I guess I did; said that it was in company with her, although I don't remember his being there now. My recollection was fresher probably then than it is now. I would not probably have written that to Mr. Hinsey unless I had recollected it at that time. I undertook to write to Mr. Hinsey a correct statement of the facts as they were known to me.

Redirect examination:

DEF'T'S COUNSEL: You gave us notice to produce these letters. You are entitled to them. We will let the jury have them.

Q. Is that the letter you wrote to Mr. Hinsey Aug. 14th, 1884?

A. Yes, sir.

Q. Is that the letter you wrote Mr. Underwood on or about August 13th, 1884?

A. Yes, sir.

The defendant, to further maintain the issues on its part, produced W. A. COATES, who, being duly sworn, testified as follows:

I am a grain dealer at Sparta, Wisconsin. I saw Mrs. Fishburn on the 24th day of July, 1884, on a train on the Southern Minnesota road; probably a year and a half ago. The gentleman on the stand, Mr. Thomas, was the conductor. The only passengers
107 on the train I knew were Mr. and Mrs. Thayer. I was in the second coach, about the center of the car, on the north side. Mrs. Fishburn was three or four seats in front of me across the aisle. Mr. and Mrs. Thayer were behind me. Almost directly after we left the station the conductor came in. He went to this lady, and there was the appearance of some conversation. I couldn't swear to any words that were used. She appeared to be excited and hunting for something. The conductor talked with her a minute; then he looked around under the seats and under her baggage—it might have been a minute or two minutes—something of that kind—and after had talked a minute or two pulled the bell-cord and the brakeman came in—or I don't know but the brakeman was standing there at the time. I couldn't swear as to that. Anyway the brakeman assisted the lady with her baggage, the train came to a stop, the brakeman went ahead, and the lady and the conductor followed along out, and that was the last I saw. I heard some conversation there for perhaps a minute or two minutes, and then the train started up again and the conductor went through and collected the rest of the tickets. I saw them as they went out all the time until they got out. I did not see the conductor take hold of her, and I think I would have seen it if he had. I did not hear any loud or boisterous or ungentlemanly language on the part of the conductor, and I did not see anything unusual in his conduct. He

did not appear to me to be rough, excited, or flurried. I did not see him take hold of her that I can remember. I should think the train was at a standstill about a minute.

Cross-examination:

I ship grain from Sparta over the St. Paul road. My attention was not called to this matter after it occurred until a few days
108 ago, when I had a letter from Mr. Hinsey. I had not thought of it in the meantime that I remember of now. I understood after the lady went out that day that she had lost her ticket. I could not say how many times the conductor rang the bell. My impression is very strongly that he was as quiet and composed as usual when he came back into the car and all the time.

Q. Did you or did you not say to Mr. and Mrs. Thayer at that time that you thought it was a shame to put off a woman of her age there on the prairie alone?

A. I don't think I did; if I did, I don't remember it, any way. I won't swear I didn't, but I don't think I did. A man might make some remark in a case of that kind that won't amount to anything either way.

The defendant, to further maintain the issue on its part, called J. W. THAYER, who, being duly sworn, testified as follows:

I reside in Howard, Dakota; am a druggist, and on the 24th of July, 1884, with my wife, was on Conductor Thomas' train. We were on the north side of the coach, near the center, directly behind Mr. Coates. Mrs. Fishburn was sitting on the opposite side three or four seats ahead of us. She appeared to be looking for something when the conductor came in. It was three or four minutes after we left the station. He went to her first, and they commenced to look. She seemed to be looking in her portem*anine* or pocket book and he around on the floor under the seat. This continued probably a minute. I could only catch once in awhile a word of the conversation. I heard the conductor say something about you had better step off and get your ticket or find it if you have left it. I did not hear anything Mrs. Fishburn said after he made this remark.
109 Then the conductor reached for the bell-cord after he made this remark. Between the time the conductor made that remark and the time he pulled the bell-cord they were still looking for the ticket and seemed to be engaged in conversation; the train slackened and then started again. I forget whether he called for the brakeman to come or whether he came in voluntarily. I saw him come in. I think it was after the bell-cord was pulled—I would not say for certain—and he seemed to be looking for something; that was before the train came to a stop. Next I saw him pick up her luggage and go out of the car. I did not hear any conversation between the brakeman and conductor that I now recollect. Mrs. Fishburn got up and walked towards the door and the conductor followed behind. I was watching them all the time. The conductor did not at any time have hold of Mrs. Fishburn. The train stopped as they passed out. I couldn't say as to what occurred after they

passed out. I heard no loud, abusive, or ungentlemanly language there. The conductor appeared very calm, as he always does or usually is. I did not see any excitement or undue haste. I do not remember anything distinctly about these men coming forward as has been mentioned here. I did not hear any of the conversation on the platform. I saw nothing on the part of Mrs. Fishburn indicating resistance or that she was obliged to go. I saw Mrs. Baker at Howard two or three weeks ago. She came down to the house in the morning before we were up—to my wife's millinery store. She came into the store and introduced herself; said she had heard of me through a friend of mine in Edgerton and of hers—a Mrs. Gates, and she wanted to know what we knew about her
110 mother being put off the train. She gave me a paper to read, and asked me if I could swear to that—if I would be willing to sign it. I read it over, and told her I couldn't sign it, couldn't swear to it. She said of course she didn't want us to swear to anything that wasn't so, anything but the truth. This is substantially all that took place.

Cross-examination:

I didn't hear much of the conversation; caugh- now and then a word; probably not all of any sentence.

Q. Now, can you swear that he didn't say to her, "If you have lost your ticket you must get off and go and find it?"

A. I don't think he said that.

Q. Can you say that he did not say that?

A. No, sir; I couldn't. I don't think the brakeman came in until after the bell was rung. My impression is he came in after the bell was rung. I didn't say to Mrs. Baker when she was at my place that I didn't hear the conversation. I said that I did not hear enough of it to do any particular good to either party that I knew of.

Q. You gave her to understand that you didn't know what the conversation was?

A. Yes, sir.

Q. Did you intend to deceive her, or do you say so now?

A. I intended to get out of coming down here; that is what my intentions were.

I think the first time I ever spoke to Mr. Thomas was on my way up to Howard. I haven't seen him since, not until——

Q. Then why did you state in your direct examination that he was cool and collected, as he naturally is?

A. When I had seen him.

Q. You didn't put in that; you said he was cool and collected, as he naturally is, giving the jury to understand that he was
111 naturally a cool man. How could you say that and how can you say that?

A. From general appearances. I did not say to Mrs. Baker when she was at my house that I noticed her mother was crippled on that occasion; nor that Mr. Coates said it was a ridiculous shame for them

to put a woman off of that age on the prairie alone; nor that I felt so incensed at the manner the conductor had treated her mother that I could hardly keep my own hands off the conductor; not anything of the kind; not that I thought it was a ridiculous shame, and I noticed it more because my own mother or wife's mother was about the same age; nor did I tell Mrs. Gates that the treatment of Mrs. Fishburn was cruel and outrageous, and that I could hardly — my hands off the conductor; nor did I tell Mrs. Baker that I had told that to Mrs. Gates.

Re-direct examination:

I did tell Mrs. Baker that we were all of us in sympathy with her mother; she had lost her ticket or seemed to have lost it, and had to leave the train and go back for her ticket. I thought it was very —. It was too bad that a lady of her age—as I remember her then, I thought she was older than she is. I made the remark I would hate to have my mother put off the train, and that we all talked of it afterwards.

The defendant, to further maintain the issues on it part, produced Mrs. JENNIE E. THAYER, who, being duly sworn, testified as follows:

I am the wife of the last witness, Mr. Thayer, and was with him on the train, as he has testified. I saw Mrs. Fishburn three or four seats ahead of us on the south side of the car. We were near the center of the car on the north side, and Mr. Coates was directly in front. Mrs. Fishburn seemed to be searching for something
112 in her pocket-book pockets after she took her seat. The conductor came in and, I should judge, asked her for her ticket, and the lady seemed to be looking for it at the time, and she spoke to him, but I couldn't swear to the conversation, because I didn't notice it, and directly he assisted in the search, and a short time after that, after they looked a few seconds, he pulled the bell, and the brakeman came down, and they were all in conversation, though I couldn't understand their words, and finally the brakeman took the baggage and started towards the front end of the car, and the lady followed after the brakeman, and the conductor last. Prior to the time that the brakeman came in up to the time he rung the bell they were searching for this ticket; I think they searched somewhere about a minute; Mrs. Fishburn arose from her seat; while she was standing up she seemed to be looking; stepped out towards the aisle, so the conductor assisted in looking. I think then the conductor stepped in and looked.

I can't say whether the brakeman came in before or after, but I think just before, the bell was rung; the brakeman assisted in the search. I didn't hear any conversation between the brakeman and conductor. I was watching them when they all went out. I did not see the conductor have hold of Mrs. Fishburn at any time, and did not hear any loud or boisterous language on the part of the conductor, for we certainly should have heard his conversation if he had. I did not hear the conductor order the plaintiff or attempt to

put her off. He did not seem excited or in a passion at all, as I took it. I didn't see anything that was hasty or angry or ungentlemanly at all. He seemed perfectly gentlemanly in every respect. The conversation—I can't say as to that, but otherwise he was gentlemanly. I heard no conversation that took place on the platform.

Cross-examination:

113 I heard no words whatever. Mr. Coates and I were conversing together at the time. We talked about it afterwards; merely spoke of it; expressed our sympathy on account of her age, because she was an elderly lady and it was out on the prairie, and of course we didn't know how far we were from the depot.

E. H. THOMAS, recalled for further cross-examination, testified:

I wrote to Mr. Underwood, the division sup't, not long after the occurrence, giving him my statement of this matter.

Q. Did you write to Mr. Underwood this in that letter: "She couldn't find her ticket, and I looked for it through the seat she was in, and she said, 'What will I do?' and I pulled the bell to stop and then advised her to get off and return and see if she could find it?"

A. I advised her to do so; yes.

Q. Is that what you wrote to Mr. Underwood? (Letter shown witness.)

A. That is correct, I guess.

Q. And that is the way it occurred?

A. Well, that is the way I looked at it at that time. It may not have occurred just exactly that way, but it might. Everything was satisfactory when the woman got off.

DEF'T'S COUNSEL: I wish to offer the following part of the letter in evidence, viz: I went back to collect tickets, and she was the first one I came to, and she couldn't find her ticket, and I looked for it through the seat she was in, and she said, "What will I do?" and I pulled the bell to stop and then advised her to get off and return and see if she could find it, or she could go on and get another one at Fulda.

Admitted.

114 Q. What kind of a ticket did Mr. Coates have on that train?

A. Mr. Coates had a pass.

Q. From the railroad company?

A. Yes, sir.

Defendant rests.

Testimony closed.

Judge's Charge to the Jury.

Whereupon the judge charged the jury as follows:

GENTLEMEN OF THE JURY: This action is brought by the plaintiff, Mrs. Catherine Fishburn, who is a citizen of the State of Illinois, against the Chicago, Milwaukee and St. Paul Railroad Company, which is a corporation organized under the laws of Wisconsin and a citizen of the State of Wisconsin, to recover damages on account, as she alleges, of her being forcibly ejected from one of the defendant's passenger cars after taking passage at a station called Edgerton, on the division of the defendant's road called the Southern Minnesota Division, in the county of Pipestone, in the State of Minnesota, to Chicago. What she claims is, in her complaint, that, having purchased a ticket at Edgerton and paid her money, $13.50 or $12.50, as she alleges, which would entitled her to go from there to Chicago, and having gone on board the train for the purpose, that she ascertained that she had not her ticket with her, and that the conductor, after demanding her fare or demanding her ticket, forcibly ejected her from the train; and for this act on the part of the conductor, who was the representative of the company, she seeks to recover damages against the railroad company for that injury.

Now, for a good ways in this case there is no dispute in the evidence or no substantial dispute or difference as to the facts in
115 the case. It appears in evidence that on the 24th day of July, 1884, she bought a ticket at this station called Edgerton, in Minnesota, in the county of Pipestone, for the purpose of going up to a further station, called Pipestone station, also in the county of Pipestone, on said road, to visit some friends and return on the same day. The evidence seems to be that she bought a ticket to Pipestone and returnd to Edgerton; the station agent testified to that, although I believe she thinks she only bought a ticket up to Pipestone. But that is not very material one way or the other. The evidence further shows that on returning from Pipestone to Edgerton, where her daughter resided, and wanting to stop there and see her daughter, and where she expected to meet her daughter and buy a ticket, that she requested the conductor on the train, who has been a witness on the stand, to hold the train at Edgerton long enough for her to purchase a ticket from there to Chicago, and that he consented to do so. It seems that there was a station where they usually stop but a very few moments—two or three minutes—for the purpose of changing the mail and baggage and express matter, and so on; but the evidence shows—her evidence, and the testimony of the conductor also shows—that he consented to hold the train there for her to obtain a ticket at Edgerton to carry her from there to Chicago. She wanted to go to Chicago, and from there to Freeport, in the State of Illinois, or near Freeport—Orangedale or some such name—Orangeville, where her husband resided. It further appears that when they arrived at the station at Edgerton that the train halted and she and the conductor both got off, and they met the ticket agent at the station there, and

the conductor directed the plaintiff to go into the waiting
116 room, where the ticket office was, and he also informed the ticket agent, Mr. Smith, who was also a witness on the stand, that the lady wished to buy a ticket, and directed him to go into his office and make her a ticket from Edgerton to Chicago. The evidence further shows that Mrs. Fishburn went in the waiting-room and went to the window of the ticket office to purchase her ticket, and the ticket agent, Mr. Smith, also went in at the same time and went into his office for the purpose of selling her — ticket. There is some little dispute in the evidence as to whether the conductor went in or not. He testifies that he did not. I think the lady testifies that he did. But I do not see that that is very material in the case one way or the other; the evidence agrees upon the main fact, that she went in there for the purpose of purchasing a ticket, and the agent went in for the purpose of selling her a ticket from that station to the city of Chicago. The evidence further is agreed that she paid her money for a ticket; that she handed the ticket agent a twenty-dollar bill, and that he received it; that he made out a ticket for her and handed her back the change. It seems the price of the ticket, she thinks, is $12.50, but the agent, who is no doubt correct about that, says that it was $13.50; that that was the price of the ticket, and he probably would be more likely to know about that than she would. But I don't know as it is material in the case at all, one way or the other, whether it was $12.50 or $13.50. But the evidence is agreed that she paid her twenty dollars and he received the money and handed her back the change. It is further in evidence also, on the part of the ticket agent and on the part of Mrs. Fishburn herself, that about the time he was handing her back
the change the conductor hurried them up or the daughter
117 of the plaintiff hurried her up, and about that time or a little after the conductor called, "All aboard," and that she received her change from the agent, supposing that she had also received her ticket at the same time, and put the change into her wallet and went on board the train. The ticket agent also testifies that he supposed he gave her the ticket, and he insisted all that day and until the next morning that he had given her the ticket. The evidence seems to be agreed on both sides that she supposed that she had taken the ticket, which the evidence shows she had purchased and paid for, and the ticket agent, Mr. Smith, supposed that she had taken her ticket. There is nothing in the case to give rise to any suspicion that the agent acted improperly or dishonestly, or that he had any other idea than that he had delivered the ticket to her. It would seem that the evidence makes a clear case of a mistake, a mutual mistake, on the part of the plaintiff and the ticket agent as to the fact of her receiving the ticket. She was entitled, having paid for the ticket, and it having been made out for her, she was entitled to receive it. That is what she went there for, to get one. That is what she undertook to do, and it was her privilege to receive the ticket; it was her right. It was the duty of the agent to deliver it to her, and the evidence tends to show that she supposed she had received it, and that the agent supposed he had hand- it to her,

but it turns out, as a matter of fact, on the next day, that the agent finds the ticket folded up in the twenty-dollar bill & put away in the safe, the twenty-dollar bill that she had handed him to pay for the ticket. Those, it seems, are the facts. There is no particular dispute about it. He had not, in fact, handed her the ticket, although she supposed he had and went on board the
118 train on that supposition, and although the ticket agent supposed she received it; so that it would seem beyond all question that there was a mutual mistake between them as to the fact of the ticket being delivered into her possession.

Then the evidence shows on both sides that she went on board the train. Although the train was a little behind time and was waiting for her, she went on board the train and got safely on board before the train had started or before it had orders to start, and then the train pulled off. The daughter helped her on board and then got off, the brakeman helping her off, and they bid good bye, the daughter going to her house and the train moving on. So far there is very little dispute or controversy about the facts. The controversy between the parties arises when we come to the consideration of what took place between the conductor and the plaintiff on board the train after the train started from Edgerton on its destination eastward through Minnesota toward Chicago. The evidence on the part of the plaintiff tends to show—her own testimony tends to show—that when the conductor came into the car where she sat—she sitting in the front end of the car—and inquired of her for her ticket, as is customary in such cases, that she told him that she thought she had lost her ticket, and then she says that he immediately said that she must get off the train and go back. The conductor tells an entirely different story. That you may have the matter freshly in your minds when you retire I will read to you from the transcript of the reporter's minutes just what the plaintiff testifies to and what the conductor testifies to in regard to what took place in the train before she went off the train. She says:

119 "I walked down the aisle, looking where I had taken up my baggage. I looked around there, and when I turned around there was an old gentleman sitting opposite to me."

Q. What took place at the time; what was said between you and him at the time? I think you may state (that is said by the court). She says, "Well," he said, "what are you looking for, lady?" I said, "I am afraid I have lost my ticket." Said he, "You didn't have it in your hand when you came in," and he could see every move I made, for the doors were all open, and he was facing me when I came in. I went back to my seat and looked among my baggage again, and another time through my pockets, and did not find the ticket. I just got up again and was standing in the aisle when the conductor came in. I was consoling myself that he had seen me buy my ticket. I didn't feel at all alarmed, for the conductor called for the ticket as well as myself, saw me pay for it, and I thought he would be kind and merciful to me. The minute I had said, "I am afraid I have lost my ticket." "Well," said he, "you must get right off, then," and immediately put up his hand to pull the bell-

cord. Well, I was so shocked I just stood and looked at him. He said it in such an ugly manner, and the train commenced to slack up pretty near to a standstill, and they were right on this long trestle bridge, and of course wouldn't stop there. Finally pulled up again and commenced going faster and faster, and that seemed to enrage the conductor so that he just fairly jumped at me. Says he, "Get your baggage," and at that he reached up to ring the bell again, and did ring it just as hard as he could, and I just kind of sank down; said, "Well, I can't," and that was all I would do. I set there, and at that, while he was yet ringing the bell, the brakeman came in, and said he to the brakeman, "Get this woman off here." As I was standing right back, kind of holding onto
120 my seat, the brakeman stepped right into my seat and took all my baggage and walked out with it, and as soon as he had walked out—the train was not yet to a standstill—the conductor took me here by the shoulder and just urged me along, and the minute the train came to a standstill he shoved me out of the door. The brakeman got down and put my things down and helped me down, and said the conductor, "You can walk back." At that I was standing there, and I heard a voice, and I looked around and saw Mr. Pickett, a neighbor of mine. He had boarded the train to go to St. Paul.

That is what she testifies in regard to what took place in the car. Now, the conductor tells a somewhat different story.

Q. Did you see Mrs. Fishburn in the car?

This is what Mr. Thomas, the conductor, testified to.

Q. Did you see Mrs. Fishburn in the car?

A. Yes, sir.

Q. What position did she occupy with reference to the front end of the coach?

A. She sat in either the 3d or the 4th seat on the south side of the coach. She was the first passenger in the car.

Q. What did you do then?

A. I went along toward the lady to take her ticket.

Q. Did you notice her or see anything of what she was doing before you approached her—before you came to her seat?

A. Well, she appeared to be doing something either with her pocket-book or little hand satchel or something she had. She appeared to be fumbling in her pocket or something of that kind before I got to her.

Q. State what was done or said next when you came to her seat.

A. Why, I came up to her seat for her ticket and she ap-
121 peared to be looking for the ticket or something, I didn't know, and she says, "I can't find my ticket—I think I have lost it, and, says I, "we may find it on the floor. She stepped out of the seat to the aisle, and I looked around there myself for the ticket, and she looked and she couldn't find it, and she says, "It is lost, what will I do?" Says I, "If I was in your place and had bought a ticket to Chicago I would get off and go back and try to

find it;" says I, "Your daughter may have the ticket, she was in the ticket-office with you. Your daughter may have the ticket herself. Very likely you will find the ticket by going back, or you can go on to Fulda and buy another ticket from there to Chicago."

Q. Where was Fulda?

A. Fulda is 29 miles this side of Edgerton

Q. State exactly the language you used about her going on.

A. I told her that if I was in her place and had bought a ticket to Chicago I would go back and try and find it; that I thought maybe her daughter might have it, as she was in the ticket office with her, but if she wished to go on she could go to Fulda and buy another ticket there from there to Chicago, and it shouldn't cost her anything to go to Fulda.

Q. What reply, if any, did she make to that statement?

A. Well, she at that time, when I told her this—then I reached up and pulled the cord and she said she thought she would go back and find her ticket, and I stopped the train.

Q. When did you pull the bell-cord—before or after she made that remark?

A. Just after this talk.

Q. After the conversation?

A. Yes, sir.

Q. Had you been engaged in assisting her to search for that ticket?

122 A. When she stepped out of the seat I assisted her in looking around in under the seat and in under the cushions, and she was all this time looking through her pockets or clothes. If I remember right she had on a linen duster—circular. I wouldn't be positive, but I think she did.

Q. You say then you pulled the bell. State what was done then, what occurred?

A. The train slacked up when I pulled the signal to stop, and I suppose the engineer—I didn't know that he was on this bridge, you know, or near it—*he* saw he was going to stop right on the trestle and he pulled out again, and as he started to pull out I pulled the cord again.

Q. Did the train then come to a full stop?

A. Yes, sir; at the east end of the bridge.

Q. What was done when the train came to a stop the last time?

A. The brakeman took the baggage and carried it out and she walked out and I walked out behind her and we helped her off the train.

Q. You were in the rear of all of them, then?

A. Yes, sir; I stepped back to one side of the seat and let her step out in front of me?

Q. What occurred after you got out onto the platform?

A. We helped her down onto the ground.

Q. Who assisted her down to the ground?

A. The brakeman. I told her to remain right where she was until the train pulled out of the way, then she could take the track and walk back to Edgerton.

Q. Did you, at any time, take hold of her and push her off?

A. No, sir; I didn't touch the lady at all.

Q. Did you, at any time, order her off?

A. No, sir.

123 Q. Did you, at any time, use any loud or boisterous language to her?

A. No, sir; I didn't.

Q. Did you have your hands upon her as she walked out toward the platform?

A. I did not.

Q. Did you know or have any knowledge of the plaintiff's health or condition at the time?

A. I did not, sir.

Q. Now, after she was out on the ground state what occurred, if anything, while the train was standing there.

And I don't care to read any further from the testimony of either side as to what took place outside; I leave that to the recollection of the jury. What I wished particularly to call your attention to is the statements of these two witnesses, the principal witnesses in the case, as to what took place between them in the car from the time that it left Edgerton up to the time that she got out on the ground. Now, the jury will bear in mind that the evidence shows conclusively that both these witnesses were laboring under a false impression as to the fact of the ticket having been lost by the plaintiff. The evidence shows—this evidence of both these witnesses shows—right through, from first to last, that up to the time she got off the train that she supposed that she had lost her ticket; she made no other claim. The conductor seems to have supposed the same thing. I am not aware of any evidence in the case tending to raise any suspicion that he did not have the same supposition that the plaintiff had in regard to the fact of her having lost the ticket.

There seems to be the same mutual mistake carried along there that was committed before, or the result of it, they both supposing that she had lost the ticket, when, in fact, she had failed to take the ticket at the office, and the agent there had put it in the safe with the bill that she gave him to pay her fare. Now then, the first question

124 which the jury will consider is what the real facts of the case were in regard to the conductor forcibly putting her off the train, or requiring her to get off the train, without giving her a chance to pay her fare. The jury has heard the testimony of the plaintiff in regard to what took place, and heard the testimony of the conductor in regard to what took place. It is for the jury to say whether it would not have been perfectly reasonable and proper for the conductor to have given the advice which he says he did if the facts were as they both supposed they were—that she had lost the ticket. It will be for you to consider, under the circumstances, if the facts were as they both supposed, what the plaintiff would naturally wish to do, and what advice would be best for the conductor to give her. He says he advised her if she had bought a ticket to Chicago and had lost it that she had better go back and search for it, and his evidence tends to show that, in pursuance of that advice, she got off the train to go

back and look for her ticket. Of course if the plaintiff and the conductor had understood the real facts of the case that would have been the best advice, but under the false impression as to the fact of her having lost the ticket it will be for the jury to say whether, under all the circumstances, that would not have been the best thing for the woman to do. She knew that she had a home at the station at Edgerton; her daughter lived there, a married lady. She had been there herself and just left there.

The conductor knew that; the testimony shows that the conductor knew she had a married daughter living there at Edgerton. They had got out about 80 rods or a hun-
125 dred, or between that and half a mile, when the train stopped. She had bought a ticket for Chicago, costing $13.50, and the supposition was that she had lost it. If she had lost her ticket and did not find it again she would have lost the amount she had paid for it, because these tickets are transferrable from hand to hand, and whoever has it can use it. They are not written to any particular person. Anyone who has one within the life of the ticket can use it. Then, if you should find from all the evidence in the case that they both supposed that she had lost the ticket, that might serve to throw some light upon the real transaction that took place between the parties, and it is for that purpose partly that I call your attention to that aspect of the case, that they both supposed that the ticket was lost. Of course, she would have the right to determine whether she would go back and look for her ticket or pay her fare and go on. If she had lost her ticket as she supposed she would not have a right to travel on the train without paying fare again. If the jury believes from all the evidence in the case that there was a mutual mistake made between the ticket agent, where the ticket was purchased at Edgerton, and the plaintiff in the case, as has already been stated by the court and as the evidence seems to show, if there was a mutual mistake between the parties, and after they got upon the train, the conductor and the plaintiff in the case, and when the conductor came around and asked her for her ticket, that she was looking for it and said she thought she had lost it, and if the looked for the ticket and were unable to find it and were both of the impression and belief that she had bought her ticket and had it delivered to her and had since dropped it or lost it, under those circumstances the conductor
126 of the train would not have been under obligations to have carried the woman without paying her fare. It was, no doubt, his duty as conductor of the train, if she had lost her ticket or she supposed she had lost her ticket and could not present it to him, it was, no doubt, his duty to collect the fare, and she would have no right to ride upon the train without paying her fare, and right here is where the plaintiff and defendant disagree. Here is where the real contest commences. The plaintiff now claims, after the evidence is all through, that the evidence shows that the conductor did not demand her fare or give her a reasonable chance to pay her fare, but insisted upon putting her off the train, and did put her off the train without demanding the fare and without giving her a

reasonable chance to pay her fare; and if the jury should believe, under all the circumstances in the case, taking the whole evidence together, that those are the facts—that he did not give her a chance to go on and pay her fare; did not demand it and give her a reasonable chance to pay it, but forcibly ejected her from the train—no doubt the company would be liable for all the damages which were sustained by reason of the wrongful act of the conductor in so forcibly ejecting her from the train.

But if on the other hand the jury should believe that the conductor did demand the fare, that he gave her a reasonable chance to pay her fare, that she made no offer to pay her fare, said nothing about it, but consented to get off the train with the idea of going back to look after her ticket, which she supposed was lost, then your verdict should be for the defendant. The plaintiff in that
127 case could not recover. There is not much evidence in the case outside of the testimony of the conductor and the plaintiff in the case as to the conversation which took place between them in the car. There is one item of evidence, however, and that is the testimony of Mr. Thayer, who, I believe, is all the one, if I recollect right, who has any recollection of what was said between the conductor and the plaintiff on that occasion while they were in the car. Mr. Thayer says:

Q. Did you hear anything that was said between them?

A. I could catch once in a while a word.

Q. State what you heard between them, if anything.

A. Well, I heard something about "you had better stop off and get your ticket" or "find it if you have left it."

Q. Who said that?

A. The conductor.

Q. Who did he address that remark to?

A. To Mrs. Fishburn.

That evidence on the part of Mr. Thayer, who was one of the witnesses who resides at Howard, Dakota, tends to corroborate the testimony of the conductor as to what was said between the parties; that he advised her to go back if she had lost her ticket and look for it and try to find it. According to the testimony of the plaintiff, no such thing as that was said by the conductor, but as soon as he ascertained that she hadn't a ticket that he ordered her off the train; said that she must go back. Of course, he would have no right to order her off the train and send her back because she had lost her ticket. His duty was, if she wanted to go on and was
128 ready to pay her fare, to receive her fare and allow her to ride, and his testimony, if it is to be believed, goes to show that he offered to let her ride, to go on to the next station, Fulda, 29 miles from there, free of any charge, and there she could buy a ticket to Chicago, which would cost her presumably less than it would from Edgerton. Perhaps the conductor would have been under no obligation, if they had supposed she had lost her ticket, to stop the train and allow her to get off, but would have had a right to have demanded her fare. Probably that would be privilege on his part, if she refused to pay her fare, to put her off at a reasonable place, but

the train being behind, the evidence showing that on account of waiting there for the agent to get this ticket, that it was four or five minutes behind, the court could not say, as a matter of law, that it would be under any obligation to stop and allow her to get off to go back and look for her ticket at that place, but undoubtedly he might allow her to do it, if that was what they agreed upon, that was the arrangement they made between them, it would be all proper and right. The other evidence of the other witnesses in the car, the evidence of Mr. Coats, the evidence of Mrs. Thayer, and the evidence of the brakeman, although I believe they do not either of them testify in regard to the conversation between the parties, their evidence all tends to corroborate the testimony of the conductor in regard to what was actually done, and in regard to the conduct of the conductor. The plaintiff testifies that he took hold of her and forced her along and pushed her out of the door of the car. The evidence
of the conductor is that he did not touch her person, and the
129 evidence of Mr. and Mrs. Thayer and Mr. Coates and the brakeman is that he did not touch her. There are circumstances in the case bearing upon the main question as to whether he forcibly ejected her from the train, or required her to get off without giving her the privilege of going on and paying her fare.

If this jury should find upon all the facts of the case, the burden of proof being upon the plaintiff to satisfy you by the preponderance and weight of the testimony, that the conductor put her off the train unnecessarily, without giving her a chance to pay her fare, after they had found out that she hadn't her ticket, no doubt the company would be liable.

In regard to the question of demanding her fare, the demanding of her ticket in the first instance undoubtedly was a sufficient demanding of her fare. That was sufficient in the first instance when he came around to her seat and asked her for her ticket. That was equivalent to demanding her fare. If she hadn't a ticket she could pay money; but after they looked for the ticket—as the defendant's evidence tends to show they did; her evidence tends to show that she looked for it and the conductor did not—but after they or she had looked for the ticket and ascertained that it could not be found, that she had lost it, or they supposed she had lost it—if, after that, you find that the conductor refused to allow her to pay her fare, or forced her off without giving her a reasonable chance or opportunity to pay her fare, the company no doubt would be liable.

There is no evidence in the case to show that she offered to
130 pay her fare, not a particle. There is evidence that her friends, coming out of the other car and seeing her standing on the ground, offered to her and the conductor that if she would come back they would pay her fare, if she had not means. But she testifies herself that she had means to pay her fare; but there is no evidence that she decided to pay it and go on, instead of going back; no evidence she offered to pay her fare. There is no evidence that he formally demanded the fare after they had ascertained, as they supposed, that she had lost the ticket. I submit it to you to say upon all the evi-

dence whether it shows that he forced her off the train without giving her an opportunity to pay her fare.

DEFENDANT'S COUNSEL: Excepting that she could go on to Fulda.

COURT: She does not testify to that. That is a question for the jury. If the jury should believe what the conductor says—that he offered her the privilege of going on to Fulda free and then buying a ticket there—the plaintiff could not recover in the case, because that, under the circumstances—they supposing the ticket was lost—was a perfectly reasonable offer. It was more than the conductor under the circumstances would have been bound to allow her. He had the right undoubtedly, if she had lost her ticket or hadn't a ticket to present, it was undoubtedly his duty to collect fare from that time or from Edgerton. If you believe that evidence to be true—that he offered her the privilege of going to Fulda without paying her fare and then buying a ticket there—that must be con-
131 sidered a reasonable proposition on his part, and if that is the fact I do not see how the plaintiff could expect to recover. She does not testify to that, but her evidence tends to show he put her off the train by force—hurried her along.

If the jury should find upon the whole facts for the plaintiff in the case, and that the plaintiff is entitled to recover, it would only then be a question of how much she would be entitled to receive at your hands for being put off the car unjustly and wrongfully. She would be entitled to recover all the damages she has actually received—compensatory damages. There is no evidence in the case that there has been any pecuniary loss to her on account of being put off the train—any pecuniary money loss. There is no proof that she has lost anything in the way of money, but the evidence shows that she was paid back her money; that the agent gave her another ticket to Dubuque, which cost about the same as a ticket to Chicago, and, whether it was a little more or little less, that they adjusted the difference, whatever it was; so that, so far as her fare is concerned and the question of money is concerned, there is no evidence that she has sustained any loss by reason of this transaction.

But that, of course, is not the only ground of damages. If she was put off the train unjustly by the conductor without giving her a reasonable chance or opportunity to pay her fare, if she wished to pay it, then she would be entitled to recover for the pain and suffering which she endured and sickness, as a consequence of
132 such forcible ejectment, and for the indignity of being unjustly ejected from the train, and those damages would be largely in the discretion of the jury. The evidence tends to show that she walked back there in a hot day, over that bridge, some 80 or 100 rods, to the depot, and went to her daughter's house, where she was ill, nervous, and considerably prostrated. The evidence tends to show an account of this transaction, coming back from where the train stopped to the depot, and to her daughter's house, and if the jury find that she is entitled to recover, of course the inconvenience of being put off, the pain and suffering, mental and physical, which

she endured would be ground of her damages, and if the jury believe that the conductor acted maliciously in putting her off—unjustly and maliciously towards her—that his conduct was rough, ungentlemanly, and malicious, you may give exemplary damages against the company.

This is largely in the discretion of the jury.

In any case, if you find for the plaintiff, the damages should be reasonable and not in any manner excessive. They should be commensurable with the nature and extent of the injury sustained by Mrs. Fishburn as a consequence of being put off the train. There is no evidence in the case tending to show, and there is no claim made, that her health has been permanently injured or that she has suffered in any way after the time she left her daughter's house to go to Dubuque, and what damages she sustained would be for the time that she was put off the train up to the time, a few days afterwards, when she left her daughter's house to go away. You
133 may take the case, gentlemen, and if you should agree upon your verdict after the court is adjourned you may then seal your verdict and deliver it in the morning.

That thereupon the jury retired to consider their verdict, and on the morning of the 16th of December, 1885, at the opening of court brought in a verdict for the defendant.

Whereupon the plaintiff, by her counsel, moved the court to set aside said verdict and to grant a new trial upon the minutes of the court, and made and filed the following motion and exceptions:

United States District Court, Western District of Wisconsin.

CATHERINE FISHBURN, Plaintiff,
vs.
THE CHICAGO, MILWAUKEE AND ST. PAUL RAILROAD COMPANY, Defendant.

And now comes the plaintiff in the above-entitled action, on this 16th day of December, 1885, in open court, and at the close of the trial, and gives notice of a motion based on the minutes of the court, taken on the trial of the above action, to set aside the verdict of the jury in this cause, and that a new trial be ordered herein, and specifies the following grounds for said motion:

I.

134 Because the court did in fact charge the jury, as appears on page 4 of the reporter's minutes of the charge and in lines 18, 19, & 20, as follows:

"There is nothing in the case to give rise to any suspicion that the agent acted improperly or dishonestly, or that he had any other idea than that he had delivered the ticket to her;" which charge was contrary to the law of the land.

Whereas it ought to have been submitted to the jury as a question of fact whether the ticket agent was guilty of any improper conduct and whether he was not guilty of negligence.

And because the court in its charge, on the same page, 4, and in lines 21 & 24, inclusive, charges the jury that "It would seem that the evidence makes a clear case of mistake, a mutual mistake on the part of the plaintiff and the ticket agent, as to the fact of her not receiving the ticket;" which was contrary to the law of the land.

Whereas, by the law of the land, it ought to have been submitted to the jury as a question of fact whether the ticket agent had exercised the utmost care and diligence in delivering the ticket and whether the plaintiff had exercised ordinary care and diligence on her part in seeing that it was delivered to her.

II.

Because the court charged the jury, on page 12 of reporter's minutes of said charge (to be found in lines 1 to 23 of said page), as follows:

"The jury has heard the testimony of the plaintiff in regard to what took place and heard the testimony of the conductor as to what took place. It is for the jury to say whether it would
135 not have been perfectly reasonable and proper for the conductor to have given the advice which he says he did, if the facts were as they supposed they were, that she had lost the ticket. It will be for you to consider, under the circumstances, if the facts were as they both supposed they were, what the plaintiff would naturally wish to do and what advice would be best for the conductor to give her. He says he advised her if she had bought a ticket to Chicago and had lost it that she had better go back and search for it, and his evidence tends to show that in pursuance of that advice she got off the train to go back and look for her ticket. Of course, if the plaintiff and the conductor had understood the real facts of the case that would not have been the best advice, but under the false impression as to the fact of her having lost the ticket it will be for the jury to say whether under all circumstances that would not have been the best thing for the woman to do;" which was contrary to the law of the land.

Whereas by the law of the land it should have been submitted to the jury as a question of fact whether the place where the conductor advised the plaintiff to get off, and where he stopped the train and advised her to go back, was or was not a proper and safe place, considering the plaintiff's age, sex, and physical condition, and inasmuch as the plaintiff has testified on the trial that she would have paid a second fare if it had been demanded (see page 18 of reporter's minutes of the evidence,) it should have been submitted
136 as a question of fact to the jury whether or not the conductor's advice was unreasonable as a converse proposition in connection with the damages and hazards of walking back on the trestle bridge.

III.

Because the court charged the jury (see reporter's minutes of said charge, page 17, lines 8 to 24, inclusive) as follows:

"In regard to the question of demanding her fare, the demanding of her ticket in the first instance undoubtedly was a sufficient demanding of her fare; that was sufficient in the first instance; when he came around to her seat and asked her for ticket that was equivalent to demanding her fare." If she hadn't a ticket she could pay money. But after they looked for the ticket, as the defendant's evidence tends to show they did—her evidence tends to show she looked for it and the conductor did not—but after they or she had looked for the ticket and ascertained that it could not be found, that she had lost it, or they supposed that she had lost it—if after that you find that the conductor refused to allow her to pay her fare, or forced her off without giving her a reasonable chance or opportunity to pay her fare, the company, no doubt, would be liable. There is no evidence in the case to show that she offered to pay her fare, not a particle;" which was contrary to the law of the land, for by this mode of submitting the facts to the jury the plaintiff's whole case was taken from the jury and nothing left to go to the jury for the plaintiff; for under the circumstances in this case, in order to give the conductor the right to order the plaintiff to leave the
137 train, the conductor must first demand the second fare and the plaintiff refuse to pay the second fare *and the plaintiff refuse to pay the second fare.*

And because of the aforesaid errors on the part of the court and its charge and direction to the jury in the trial of this action in the aforesaid assignment of errors, as set forth, the plaintiff avers that by reason thereof there was a mistrial, and prays that the verdict in this action be set aside and a new trial awarded.

B. DUNWIDDIE,
Plaintiff's Attorney, Monroe, Wis.

That thereafter the said motion duly came on to be heard before the court, and was argued by the counsel of the respective parties, and the court took the matter under advisement, and thereafter and on the 18th day of September, 1886, entered an order overruling said motion.

To which ruling of the court the plaintiff, by her counsel, duly excepted.

Whereupon judgment was duly entered for the defendant.

United States District Court for the Western District of Wisconsin.

CATHERINE FISHBURN, Plaintiff,
vs.
THE CHICAGO, MILWAUKEE AND ST. PAUL RAILROAD COMPANY, Defendant.

The plaintiff in this action, by her attorney, B. Dunwiddie,
138 having filed a motion in this cause to set aside the verdict of the jury and grant a new trial based upon the minutes of the court, and said motion having been argued by the counsel of the respective parties and submitted to the court, and the court being not

sufficiently advised, having taken time to consider, and on the 18th day of September, 1886, having overruled said motion, the said plaintiff, by her said attorney, B. Dunwiddie, hereby excepts to said ruling of said court in said cause.

Dated September 18th, 1886.

B. DUNWIDDIE,
Plaintiff's Attorney, Monroe, Wis.

B. F. DUNWIDDIE AND
H. M. LEWIS,
Of Counsel.

It is stipulated that the foregoing may be signed as the bill of exceptions herein.

Dated January 5, 1887.

JOHN W. CARY &
BURTON HANSON,
Def't's Att'ys.
B. DUNWIDDIE &
B. F. DUNWIDDIE,
Att'ys for Pl'ff.

I, Romanzo Bunn, judge of the United States district court for the western district of Wisconsin, and before whom the foregoing cause was tried, hereby certify that the foregoing is the bill of exceptions this day settled, signed, and sealed by me in the foregoing action, and that it contains all the testimony taken on the trial of said action, and all the rulings of the court and all the exceptions
139 thereto, and all the offers, requests, objections, and motions of the respective parties in said action, and all the charges of the court therein, and the same is now settled by consent of the parties hereto as the bill of exceptions in this action this 11th day of January, 1887.

R. BUNN,
District Judge.

140 Supreme Court of the United States.

CATHERINE FISHBURN, Plaintiff in Error,
vs.
THE CHICAGO, MILWAUKEE & ST. PAUL RAILROAD COMPANY,
Defendant in Error.

Know all men by these presents that we, Catherine Fishburn and J. B. Galusha, banker, of Monroe, Wisconsin, are held and firmly bound unto the Chicago, Milwaukee and St. Paul Railroad Company, its certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 14th day of February, A. D. 1887.

Whereas lately, at a regular term of the circuit court of the United States for the western district of Wisconsin, in a suit depending in said court between Catherine Fishburn and The Chicago, Milwaukee and St. Paul Railroad Company, judgment was rendered against the said Catherine Fishburn dismissing her complaint and for the costs of said action, and the said Catherine Fishburn having prosecuted a writ of error in the Supreme Court of the United States to reverse said judgment:

Now, therefore, the condition of this obligation is such that if the above-named Catherine Fishburn shall prosecute her said writ of error to effect and answer all costs and damages if she shall fail to make good her plea, then this obligation shall be void; otherwise to remain in full force.

CATHERINE FISHBURN. [SEAL.]
141 J. B. GALUSHA. [SEAL.]

Sealed and delivered in presence of—
S. DUNWIDDIE.
B. DUNWIDDIE.

STATE OF WISCONSIN, }
County of Green, } *ss:*

J. B. Galusha, the above-named surety, being duly sworn, deposes and says that he is worth the sum of two thousand dollars, over and above all his debts and liabilities, in property not exempt from execution.

J. B. GALUSHA.

Subscribed and sworn to before me this 14th day of February, A. D. 1887.

HENRY LUDLOW,
[SEAL.] *Notary Public for Wis.*

I hereby approve the foregoing bond, both as to the form and the sufficiency of the surety.
Feb. 16, 1887.

R. BUNN,
District Judge.

[Endorsed:] Bond on appeal. Copy.

142 UNITED STATES OF AMERICA, *ss:*

To the Chicago, Milwaukee and Saint Paul Railway Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the office of the clerk of the circuit court of the United States for the western district of Wisconsin, wherein Catherine Fishburn is plaintiff and you are defendant in error, to show cause, if any there

be, why the said judgment in the said writ of error mentioned shall not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Romanzo Bunn, judge of the district court of the United States for the western district of Wisconsin, this 14th day of February, in the year of our Lord one thousand eight hundred and eighty-seven, and of our Independence the one hundred and eleventh.

ROMANZO BUNN,
Judge U. S. Dist. Court, West'n Dist. of Wis.

Service hereof admitted this Feb'y 23rd, 1887.
JOHN W. CARY & BURTON HANSON,
Att'ys for D'f't in Error.

143 [Endorsed:] Supreme Court of United States. Catherine Fishburn, p'l'ff in error, *vs.* The Chicago, Milwaukee and Saint Paul Railway Company, def't in error. Citation on writ of error.

144 UNITED STATES OF AMERICA, } *ss:*
Western District of Wisconsin, }

I, F. M. Stewart, clerk of the circuit court of the United States for the western district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate with their respective originals now of record and remaining on file in my office, and that they are true copies of their respective originals and correct transcripts therefrom and of the whole thereof; and also a true copy of the bond on appeal, and also the original citation on writ of error and original writ of error herein.

Witness my hand and the seal of said court, at my office, in the city of Madison, in said district, this 21st day of May, A. D. 1887, and of our Independence the one hundred and eleventh.

[Seal U. S. Circuit Court, Western Dist. of Wisconsin.]

F. M. STEWART, *Clerk.*

Endorsed on cover: W. Wisconsin C. C. U. S. No. 330. Catherine Fishburn, plaintiff in error, *vs.* The Chicago, Milwaukee and St. Paul Railway Company. Filed June 3rd, 1887.

Supreme Court of the United States,

October Term, 1889.

No. 330.

CATHERINE FISHBURN, PLAINTIFF IN ERROR,

vs.

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY CO.

BRIEF OF PLAINTIFF IN ERROR.

I. C. SLOAN,
B. DUNWIDDIE, and
B. F. DUNWIDDIE,
Attorneys for Plaintiff in Error.

Hardy & Parker, Steam Printers, Janesville, Wis.

In Supreme Court of the United States.

CATHERINE FISHBURN, PLAINTIFF IN ERROR,

—VS—

THE CHICAGO MILWAUKEE & ST. PAUL RAILWAY CO.
DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

BRIEF OF PLAINTIFF IN ERROR.

This action was brought by the plaintiff in error, a resident of the State of Illinois, against the defendant in error, a railway corporation, for an unlawful ejection from a passenger train of the defendant, on the 24th day of July, 1884, while riding on the defendant's train from Edgerton, in the state of Minnesota. The action was originally commenced in the Circuit Court of Green County, State of Wisconsin, in August, 1885, and on the 6th day of October, 1885, the defendant company filed with the Clerk of the Circuit Court for Green County, a petition for the removal of the action to the Circuit Court of the United States for the Western District of Wisconsin, (Record folio 23) and an order was made, based on said petition, on the 6th day of October, 1885, removing said action into the Circuit Court of the United States for the western District of Wisconsin; and the action was afterward tried in said Circuit Court of the United States.

The Complaint is drawn under the Wisconsin code, and charges the defendant corporation:

I. With gross negligence by its ticket agent at Edgerton, Pipestone County, in the State of Minnesota, in not delivering to the plaintiff a ticket paid for, and the conductor with negligence in not giving her sufficient time to procure a ticket.

II. In putting her off its passenger train at a place were there was immediate danger of great bodily harm to her, she being an invalid lady.

III. With unlawfully expelling plaintiff from the cars of the defendant company without giving her an opportunity to pay her fare. (Record folios 5 to 11.)

These three propositions are each and all stated in the complaint, each making a constituent part of the one cause of action, being a special action on the case at common law, and although framed under the Wisconsin Code of procedure, yet it is modeled in every particular after a complaint in a special action on the case at common law.

The answer is simply a general denial, (folio 12). From the evidence it appears that the plaintiff resided at Orangeville, in the State of Illinois, and was the wife of a physician at that place. She had been an invalid for many years, suffering from nervous debility and rheumatism, and that her hands and feet were twisted and dislocated out of shape, so that she could not straighen them. That just prior to the time of the injury complained of she had been staying several months with her daughter, who resided at Edgerton, Pipestone County Minnesota, having gone there for her health, and had been much benefitted by her rest and quiet. On the 24th day of July, 1884, the plaintiff had some business at Pipestone, a small station west of Edgerton, and took the 8 o'clock freight and went to Pipestone, intending to return on the 1 o'clock freight that afternoon, and then take the four o'clock passenger for Chicago, to go home. But the freight train upon which she intended to return to Edgerton, was late, and she had to wait for the passenger train. When the conductor came to take up her ticket from Pipestone to Edgerton, she informed him of her desire to go on the same train to Chicago, and asked him if he would wait for her to purchase a ticket at Edgerton for Chicago, so that she might go on the same train, and the conductor informed her that he would.

When the train reached Edgerton the plaintiff got off the train, and both the plaintiff and the conductor informed the ticket agent of her desire to purchase a ticket for Chicago. The plaintiff's daughter was at the depot with her baggage, and the plaintiff, her daughter, and the conductor went into the office together, and while in the office the plaintiff's daughter informed the conductor that her mother was an invalid from rheumatism, and requested him to help her.

The agent took a ticket, filled it out and stamped it, when the plaintiff handed him a $20.00 bill, which act was seen by the conductor, when he turned around and walked out.

The agent took the $20.00 bill and ticket, (the price of the ticket being something over $13.00), and stepped to his safe to get the neces-

sary change, and just about that moment the conductor called, "all aboard." The agent in his haste threw both the ticket he had prepared and the $20.00 bill he had received from the plaintiff, into a drawer in his safe, where he found it the following day, took out the change, part in bills and part in silver, and stepped back to the window and dropped it into the plaintiff's open hand, which she held out for it; the plaintiff supposing that the agent had given her the ticket with the change, closed her hand on it and started hastily for the train. The agent followed her and handed her her parasol which she had left lying on the window of the office, just as she got to the door. As she was about to get on the train she dropped her change, which up to this time she still held in her hand, and as she supposed, her ticket also, loose, into the pocket of the duster which she had on. When she got seated she took out the change and put it into her pocket book, and then looked for her ticket, but was unable to find it; and she was still looking for it when the conductor came in to take up tickets. She says, knowing the conductor saw her buy her ticket, she was consoling herself she would have no trouble, and when he came up, she told him she was afraid she had lost her ticket. She says as soon as she told him she had lost her ticket, he said she must get off then and pulled the bell-cord to stop the train. The train stopped just after it had crossed a long trestle bridge, some 20 feet high and 120 feet long, and about half a mile out on the prairie.

The brakeman coming in just as the train was slacking up the conductor ordered him to take her baggage, which he did, and the moment the train stopped they put her off, without demanding that she pay her fare again, and without giving her an opportunity of so doing. That while the brakeman stood on the ground after helping her off, and while the train was standing still, some friends of the plaintiff, who unknown to her, were in the rear car, came out on the platform and offered to pay her fare, which the conductor refused to allow them to do, and pulled the bell, started the train and went on and left her by the side of the road. In order to return to Edgerton she was compelled to cross a high trestle bridge above mentioned, some 120 feet long, and 20 feet high, by stepping from tie to tie, and that in doing this, carrying her luggage, she was so overcome with heat and exhaustion, when she got across, that she sank down on the ground and remained there until help came. That the mortification of being thus ejected from the train and thus treated, and the crossing of the trestle bridge, in her weak and nervous condition, carrying herbaggage, in the excessive heat of the day, so affected her nervous system, and so overcame her that she was made sick and ill, and not only lost all the benefit she had derived to her health, but had suffered continually from the effects of it afterwards.

The following is the testimony of the witnesses showing the above facts :

Mrs. Fishburn, the plaintiff, testified among other things, as follows :

I had a little business up at Pipestone, and I took the 8 o'clock freight and went up to Pipestone City, and was going to return on the 1 o'clock freight, but when I got there the agent told me the freight was an hour or an hour and a half late, and that I would get there on the passenger just as soon as I would to go on the freight : so I stayed until the passenger came along, and then I purchased a ticket to Edgerton. I had made my arrangements that my daughter would be there with my baggage, what I wanted to take through with me, and I would get a ticket and go on. (Folio 58).

After I boarded the train to return from Pipestone, I asked the conductor, would he stop for me to get a ticket to Chicago. I did'nt know at the time what the conductor's name was. I made arrangements with the conductor to allow me to get off at Edgerton; and give me time to go into the ticket office and purchase a ticket to Chicago. He said he would give me time to get a ticket. (Folio 65)

I was at the door, and as soon as the train stopped I stepped off, and Mr. Smith, the ticket agent, and quite a number of others were standing on the platform, and the conductor at the same time said : "Give us a ticket to Chicago." He said, "I want a ticket to Chicago as soon as you can get it." I don't know just how the conductor said it, but he asked about the same time for a ticket to Chicago.

Court,—"The conductor did ?"

Ans.—Yes, sir.

Court,—"Told the agent ?"

Ans,—Yes sir, and I walked right along side of the ticket agent in to the side of his desk. My daughter had all my baggage in her hands and on her arms, and she and the conductor walked right through the office into the waiting room and stood right at the window.

I took a twenty dollar bill out of my purse and handed it to the ticket agent, and he had torn off my ticket or had it already stamped, and was holding it in his right hand, and when I handed him the bill he started to the safe, and my daughter then spoke to the conductor. Said she : "Mr. conductor, will you please help my mother with her baggage in changing cars, as she is an invalid by rheumatism?" and he shouted "I only go to Wells," and at that he walked right out on the platform and called out "all aboard" and then my daughter, says she, "Hurry up Mr. Smith, or my mother will get left. (Folio 58)

He took the change out of the safe, and gave it to me, part in bills and part in silver. (Folio 65)

When the agent gave me the money he did not lay it down but gave it to me right in my hand. I did not put it into my pocket book or make any examination of it until I got on the car. I supposed I had my ticket in my hand with the money. (Folio 69)

I had my change and purse in my right hand and started for the

train and when I got to the door Mr. Smith handed me my parasol and gossamer. (Folio 59) I walked out on the platform, all the time supposing that I had the ticket I had paid for. (Folio 65)

I had on a long duster with pockets, and I dropped my change and pocket book, all loose, right into my pocket. I gathered up my things and walked about the middle of the car and sat my baggage down on the seat, and the first thing I did I got my change and put it in my purse and put that under my duster into my dress pocket and sat down, and then I thought, "Where is my ticket" the first thing, as I always prepare my ticket so as to save time and have it ready, and I began to look for my ticket, searched all through my pockets, looked through my purse and could'nt find my ticket. I looked all through my baggage, then I thought perhaps I had dropped it, having it in my pocket with my change, near the door where I picked up my baggage, so I walked down the aisle looking at where I had picked up my baggage. I went back to my seat and looked among my baggage again and another time through my pockets, and did'nt find the ticket. I just got up again, and was standing in the aisle when the conductor came in. I was consoling myself that he saw me buy the ticket. I didn't feel at all alarmed, for the conductor called for the ticket as well as myself, and saw me pay for it, and I thought he would be kind and merciful to me, and the minute I had said "I am afraid I have lost my ticket," "well," said he, "you must get right off here, then," and immediately put up his hand and pulled the bell cord. Well, I was so shocked I just stood and looked at him. He said it in such an ugly manner, and the train began to slack up, pretty near to a stand-still, and they were right on this long trestle bridge, and of course would'nt stop there. Finally pulled up again and commenced going faster and faster, and that seemed to enrage the conductor so that he fairly jumped at me. Says he, "get your baggage," and at that he reached up to ring the bell again, and did ring it just as hard as he could, and I just kind of sank down. Said I, "Well I can't" and that was all that I could do. (Folio 60)

He never said that I could either get off and go back and hunt for my ticket, or could go on to Fulda and buy a ticket there. I did not ask his advice as to what to do. I did not ask his advice nor he did not tell me that as long as I had paid $12.50 for my ticket he advised me to go back and find it if I could. I know there was no such conversation. I did'nt ask for advice and he did'nt give any. (Folio 67)

He did not say he would stop the train and let me go back after my ticket, nor that he would take me to the next station, and I could buy a ticket at Fulda. There was no such conversation as that. I would have been glad to have done that. The first thing he said was that I must get right off. Then he pulled the bell cord. (Folio 66)

There was no one in the car at the time that I knew. A Mr. Picket, Mr. Ask, and Mr. Kingsbury, whom I knew, and who lived in Edger-

ton, were on the rear car, but I did not know it until they came out on the platform, after I was on the ground. (Folio 64)

While he was yet ringing the bell, the brakeman came in, and he said to the brakeman, "Get this woman off here," and I was standing right back, kind of holding on to my seat. The brakeman stepped right into my seat and took all my baggage and walked out with it, and as soon as he walked out, (the train was not yet at a standstill) the conductor took me by the shoulder and just urged me along, and the minute the train came to a standstill, he shoved me out of the door. (Folio 60) The brakeman got down and put my things down, and helped me down, and said the conductor, "You can walk back. (Folio 61)

The conductor didn't give me any time to make an offer in the car. He just told me I must get off.

Q. You are positive of that?

A. I know it. Yes. As soon as I told him I had lost my ticket he said "you must get right off," and pulled the bell cord, and when the train came to a halt it was on the trestle work, and I presume the reason they went on was to get over it. (Folio 69)

Q. You had means to pay your fare?

A- Yes, sir?

Q. Did he ask you to pay your fare

A. No, sir.

Q. Were you willing to have paid it if he had demanded it?

A. Yes, sir.

When the train was gone I was on the side of the track. To get back there was but one way, and that was, as he told me, to walk back. I picked up my things and started back. I had a large satchel, a large basket, a shawl strap, (all that I could strap into it) and a gossamer and parasol. My things weighed not less than 30 or 35 pounds, and it was a very hot day. I went over the trestle bridge across the creek, which was about 120 feet long, and 20 feet from the water, stepping from tie to tie. When I got across the bridge I saw my daughter had seen me, and was coming, and I sat down alongside the track on some of my baggage, and cried, and waited until she came, then went to her house.

I was very much overheated when I got to her house. I had got so nervous I could hardly sit still, stand still, or keep quiet anywheres. (Folio 61)

On Thursday night, Friday, Friday night, and Saturday, I was very nervous and restless and couldn't sleep. I was sick all over and so full of pain that I could not keep quiet nowhere. (Folio 62)

I had been stopping at Edgerton that summer with my daughter for my health. It was always better for me in that country, and I had gone up there for my health. I was getting very much better, better than I had been for six or eight years, but on account of business had to take this trip home, and since then I have been getting

worse. It was a great disappointment to me in not being able to get home to attend to my business. (Folio 62)

I was very nervous, having been overheated carrying so much baggage. Of course it made me sick, being an invalid anyhow,—have been over 25 years. Saturday night I was taken with nervous chills. I never was so sick in my life, nervous chills just one after another. I waked my daughter up and she gave me a dose of laudanum and nitre, and after a little I kind of got my nerves quieted down and felt better and slept. Sunday and Sunday night I rested better, with an occasional chill, but feeling very bad, very weak and very prostrated, but I improved from that on, and knowing that I had got to home on my business, I rallied as hard as I could to try to get strength enough to start, and started Tuesday evening at 4 o'clock. My general health for some years has been very poor—have had the rheumatism in both my hands and feet so that I cannot straighten them any more. (Folio 63) I am so affected with rheumatism that just a single touch, almost, does hurt me. I was so weak I could hardly walk, I was so shocked. (Folio 67)

There was no physician at Edgerton, the nearest one was at Pipestone, 15 or 16 miles away. (Folio 69)

Mrs. M. A. Baker, daughter of the plaintiff, among other things testified as follows :

I am a daughter of Mrs. Catherine Fishburn, and was at Edgerton, Pipestone county, Minn., on the 24th day of July, 1884. I met my mother by agreement at the Edgerton depot for the 4 o'clock train. (Folio 69)

When the train arrived she and the conductor stood on the platform of the car. I says "What is it mother ?" She says "I must get my ticket." She and the conductor both stepped off and spoke to Mr. Smith, the agent, at the same time. Says to Mr. Smith, "give us a ticket to Chicago," and the conductor says, "be quick about it." They passed into the waiting room, my mother by the side of the ticket agent. Mr. Smith stepped inside the ticket office door, and Mr. Thomas, the conductor, to the window. As Mr. Smith took the ticket box from his desk, I said to the conductor, "Sir, will you please help my mother in changing at Ramsey ; she is an invalid from rheumatism." He says (and very sharply) "I only go to Wells." Mr. Smith at that time was signing the ticket. He tore the ticket from the duplicate, stamping it, and my mother drew her purse from her pocket and took a twenty-dollar bill from it. I spoke and said, "how much is it, she says it is twenty," and handed it to Mr. Smith. As she handed him the bill he took it in his right hand and turned from the window to the safe, and the conductor stepped from the window, calling "all aboard." I says, "Mr. Smith, hurry up, or mother will get left." As he stood at the safe he took the change and handed it to my mother. I supposed she had the ticket. She took the change in her right hand and stepped from the office door to go down on to

the platform, and Mr. Smith handed her a parasol. I stepped quickly after her with the baggage in my hand, and says to her as she was going by, "here, mother, get on this car, they are ready to go." She stepped up and the brakeman taking her by the left elbow, helped her on the train.

The brakeman says, "hurry up, the train is going," and I just dropped the things. I called, "good-bye, mother," and the train was then under motion. The brakeman caught me by the right arm as I sprang off the train, and I walked off up town with the rest of the friends, not supposing there was anything wrong. The first thing I knew my attention was called down the track, a gentleman saying, "Mrs. Baker, there is a lady off, isn't it your mother?"

I sprang quickly where I could get a look down the track, and I says, "yes, that is mother; what can be up?" And I ran to the house immediately, unlocking the door, and throwing down the packages I had in my arms right on to the floor, and ran just as fast as I could for the track. She saw me coming, and sat down by the side of the track on her valise, and when I got there she sat there crying. Then she told me what was the matter, and when she had got sufficiently rested I picked up the baggage and we started for the house. (Folio 70 and 71.)

Mother was there when I got home, and I found her excessively nervous. She was pacing the floor and crying. I got her to sit down, and tried to get her to be calm, and she said she could'nt. About 9 o'clock we retired and I had just got into a nice sleep and I heard her come back to bed. She said she had been up for a drink. She was shaking all over with nervousness. She was awake, as far as I can say, all night long. I don't think she slept any. On Friday morning I got up at 5 o'clock, thinking perhaps if she was alone in bed she could rest better. She seemed to fall into a slight doze. Between 8 and 9 I called her. She got up and I helped dress her, and she came out and sipped a little coffee. She couldn't do anything. She was very pale and hollow-eyed, and seemed completely worn out. (Folio 73

In the evening she kept getting worse and worse. She couldn't sit quiet. She couldn't lie quiet or she couldn't stand quiet. I had never seen her in such a state, and I was extremely troubled about it. Through the night she rested a little better I think than she did the night previous. Saturday morning she kept getting worse, and she got worse all day Saturday until evening. I was extremely frightened. (Folio 74)

Saturday night we went to bed about 8 o'clock. About 11 she called me and when I awakened I found her in a very hard nervous chill. I got up and done all I could. I asked her if she had had any before, she said, "yes, she had two slight ones." She lay in the chill until about 4 o'clock. Along about 4 o'clock I got desperate and gave her an enormous large dose of laudanum. That quieted her down, and at 5 o'clock, when I got up, she was resting easy.

At 9 o'clock or a little after, she awakened and called to me for a glass of water. She said if I helped her up she guessed she would get up. I helped her to get up and dress and into a large chair. She sat there and seemed perfectly overdone. I was very much frightened. I didn't know what to do, but towards evening she seemed to feel a little better, and through Sunday forenoon she had no return of the chills in particular. Once in a while she said she would feel a slight chill, and then it would pass away. So Sunday afternoon and evening she began to get a little better, and I coaxed her into eating a little something. Sunday night she rested after I gave her a dose of laudanum unbeknown to her. Monday she felt a little better, but still quite prostrated from the effects of it, and Monday night she proposed going home the the next day. She slept then with an opiate. Tuesday afternoon, when she was ready to start, she felt quite well. (Folio 75)

Mr. A. D. Kingsbury, a hotel keeper at Edgerton, was on the same train with Mrs. Fishburn, but in a car behind the one she was in. He says that when the train stopped he went out on the platform and saw Mrs. Fishburn on the ground, and the conductor stood on the platform. (Folio 78) That he asked the conductor why he put her off and told him he would pay her fare.

It takes from two to three minutes for my train to get under full head; which would take us pretty near half a mile. Our running time was 21, 22, or 23 miles an hour, probably. We were searching for her ticket for a minute or a minute and a half. After we started I stood on the platform until we got to the switch or somewhere near there. (Folio 99)

I wrote to Mr. Underwood, the division superintendent, not long after the occurrence, giving him my statement of this matter.

Q. Did you write to Mr. Underwood this in that letter: "She couldn't find her ticket, and I looked for it through the seat she was in, and she said, what will I do? and I pulled the bell to stop, and then advised her to get off and return and see if she could not find it ?"

A. I advised her to do so, yes.

Q. Is that what you wrote to Mr. Underwood ? (letter shown witness.)

A. That is correct, I guess.

Q. And that is the way it occurred ?

A. Well that is the way I looked at it at that time. It may not have occurred just exactly that way, but it might.

Defts Counsel: I wish to offer the following part of the letter in evidence, viz: I went back to collect tickets, and she was the first one I came to, and she couldn't find her ticket, and I looked for it through the seat she was in, and she said, what will I do ? and I pulled the bell to stop, and then advised her to get off and return and see if she could find it, or she could go on and get another at Fulda. Admitted. (Folio 113)

That the conductor said she had lost her ticket, and let her go back and hunt it, and that he was not going to keep the train there all day waiting for her. (Folio 78)

That a Mr. Ask and a Mr. Pickett both offered to pay her fare also. (Folio 79)

That in going back Mrs. Fishburn would have to cross the bridge, by walking on the ties, and that it was about 100 feet long and from ten to 20 feet high. (Folio 80)

A. R. Burkdall, an editor at Edgerton, says he saw the conductor a few days after and asked him about the occurrence, and he told him that Mrs. Fishburn got on at Pipestone, and asked him if he would stop the train long enough at Edgerton for her to get a ticket; that he told her he would; that he went into the office with her at Edgerton and saw her hand the agent some money and ask for a ticket.

That after he supposed she had her ticket her told her to get on board as soon as she could, and saw her get on.

That when he called for her ticket after the train was in motion, she could not find it, and supposing she had lost it, he told her that she better go back and hunt it, and that he stopped the train and let her off. That some persons on the train offered to pay her fare after she got off, but as the train was starting he did not want to keep the train there any longer.

That he was somewhat put out about the matter, because had delayed the train at Edgerton for her to buy her ticket, and that she had plenty of time to do it. (Folios 83 and 84.)

Mr. C. W. Ask, of Edgerton, who was on the train but in another car, says he went out on the platform, and when he got there Mrs. Fishburn was on the ground and the conductor on the platform. That he asked what the matter was and offered to pay her fare. That the conductor replied she had no ticket and had to get off the train, and that he had no time to bother with her.

That she would have to cross the trestle bridge on the ties, going back, as there was no other way, and that the bridge was from 100 to 120 feet long and 20 feet high. (Folios 85, 86, 87)

Mr. S. A. Pickett, of Edgerton, who was on the car with Ask and Kingsbury, says, that he went out on the platform where the conductor was, and Mrs. Fishburn was on the ground, and offered to pay her fare.

That the conductor replied: "She has bought her ticket and left it on the desk in the depot, let her go back and find it."

That for fear he was not understood, he said, "we propose to pay her fare."

That the conductor had his hands on the bell rope, and pulled the bell, and the train pulled out leaving Mrs. Fishburn on the ground. That the conductor appeared mad, and short and excited.

That there was an embankment on the north of the road where she was put off, 15 feet high and a ditch and slough of water on south side,

that she would have to cross the trestle bridge, which was 20 feet high, and 100 to 120 feet long in going back, or else she would have to go some 30 or 40 rods further east down the track, in order to get on a highway. (Folio 90, 91)

Mr. R. A. Smith, the ticket agent, states the occurrence in the office as follows :

When the train pulled into the station, I was out there. The conductor came toward me and said there was a party back there wishing to get a ticket for Chicago. I went into the office as soon as I could, and Mrs. Fishburn came to my ticket window and asked for a second class limited ticket for Chicago. I issued the ticket and she gave me a $20 bill. The ticket was $13 and something. I gave her the change and put the $20 bill she gave me into my safe in the money drawer. When I issued the ticket, I had to write destination in it, also Edgerton, Minn., stamp it, and cancel the limitation. The limit of the ticket was three days from date. She took her change, left the depot, and boarded the train. I picked up a parasol and another parcel, and run out to the train, and asked her if it belonged to her, and she took it. (Folio 104)

The next morning when I went to my money drawer in my safe to get my change, I found the ticket in the drawer. The circumstances were these : "I went there the next morning after some change, and the first thing that was on top was the $20 bill that she had given me, and I took that up with some other paper money to get hold of some silver and there was the ticket. The ticket was right under the $20 bill. I had not known it was there prior to that time." Folios 104 and 105.

I did not notice anything unusual about the conductor that day, only he was trying to hurry matters up as much as possible, so as not to be delayed. (Folio 105)

Q. Did you write to Mr. Hinsey that "on July 24th Mrs. Kate Fishburn got off train No. 4, and in company with conductor Thomas came into my office and called for a ticket to Chicago, which I issued and gave her ?

A. Yes, sir, I guess I did, said that itwas in company with her, although I don't remember his being there now. My recollection was fresher probably then than it is now. I would not probably have written that to Mr. Hinsey unless I had recollected it at that time. I undertook to write to Mr. Hinsey a correct statement of the facts as they were known to me. (Folio 106)

The conductor, E. H. Thomas, denies in his testimony that he went into the office with Mrs. Fishburn, when she went in to get her ticket; but he does not deny that he told Burkdall, the editor, that he did go into the office, and that he saw her hand money to the agent and ask for a ticket.

And the agent Smith admits that he wrote Mr. Hinsey July 24th, an account of the affair, and that he said in his letter, " on July 24th

Mrs. Kate Fishburn got off train No. 4, and in company with conductor Thomas came into my office and called for a ticket to Chicago," and further admits that he undertook to write Mr. Hinsey a correct statement of the facts as they were known to him at the time.

So that if the question as to whether the conductor saw her apply for the ticket and pay for it is very material, the fact is clearly settled in the affirmative by Mrs. Fishburn and her daughter's testimony, and by the admission of both the conductor and agent, made at the time, when the facts were fresh in their recollection.

As to what occurred on the train when the conductor called for her ticket, he gives as follows :

I came up to the seat for her ticket. She appeared to be looking for her ticket or something, I don't know what, and she says, "I can't find my ticket, I think I have lost it," and says I, "we may find it on the floor." She stepped out of the seat into the aisle and I looked around there myself for the ticket, and she looked and she could'nt find it, and she says, "It is lost; what will I do ?" Says I, "If I was in your place and had bought a ticket for Chicago I would get off and go back and try and find it." Says I, "Your daughter may have the ticket; she was in the ticket office with you; very likely you will find the ticket by going back, or you can go on to Fulda and buy another ticket from there to Chicago." Fulda is 29 miles east of Edgerton.

When I told her this, then I reached up and pulled the cord, and she said she would go back and find her ticket, and I stopped the train. I pulled the cord just after this talk. (Folios 95 and 96)

When the train stopped the brakeman took the baggage and carried it out, and she walked out, and I walked out behind her, and we helped her off the train. I told the brakeman to assist the lady in getting her baggage off. The brakeman assisted her down to the ground, and I told her to remain right where she was until the train pulled out af her way, and then she could take the track and walk back to Edgerton. (Folio 96)

After she was off, those gentlemen came through the car, and said, "Don't put that lady off, we will pay her fare," something to that effect. I did not know the gentlemen; they had got on at Edgerton. At this time I was standing on the platform of the baggage car. Mrs. Fishburn and the brakeman were on the ground, these gentlemen were on the platform of the coach, and the train was at a standstill. I told them lady did not wish for anybody to pay her fare, that she had lost her ticket and wished to return back to the station to find it. (Folio 97)

The brakeman, Loren Tenney, states the occurrence on the train as follows :

"After I went in the baggage car I staid maybe three or four minutes before I went back. I was in the baggage car all the while the train was in motion. When I went back into the car where Mrs. Fishburn was she was sitting down. The conductor was standing in the

aisle ahead of her. They were kind of bent over looking. She was kind of bent over as if she was looking for something. I asked him "What are you looking for?" He says, "This lady has lost her ticket." I passed around behind her and looked under the seats. The conductor stood there. He kind of straightened up and asked her what she was going to do. She says, "I don't know." He said, My advice is for you to go back. Maybe your daughter has got the ticket. SHE DIDN'T SAY ANYTHING TO THAT. He reached up and pulled the beli cord and told me to assist that lady in getting off the cars, and take her baggage. I took it and walked out. I was going through the door when the train slacked up on the bridge. Then it pulled up again, and I staid out of the door until it slacked up again. I did not look back after I started out, and I don't know whether he took hold of her or not. I couldn't say as he did. As soon as the car stopped I got off with the baggage. I did not take all her baggage. She carried a piece herself I think. I had two parcels, one in each hand.

Q. What did she say after she got off?

A. Didn't say a word. (Folio 102).

All Mr. Thomas said to her as she stood on the ground was, "You stand right there until the train passes by, and you can go down the track." I did not hear Mrs. Fishburn make any remark while she stood on the ground. After she stood on the grouud those gentlemen came forward, and one of them spoke up and said, "You needn't put that lady off. We will see that her fare is paid." I don't know who said that. It was addressed to the conductor. The conductor said, "No, sir; she don't want anybody to pay her fare. She is going back to look for her ticket." She did not say a word at that time. The train then started up. (Folio 101).

A Mr. Coates and a Mr. and Mrs. Thayer, who were on the same car with Mrs. Fishburn were sworn by the company, who say that they saw the occurrence and they testify that they heard no loud, boisterous or ungentlemanly language on part of the conductor, and saw no ill treatment, but they do not pretend to have heard what was said.

Mr. Thayer however says: "I thought it was very, it was too bad that a lady of her age, as I remember her then,——I thought she was older than she is.—I made the remark I would hate to have my mother put off the train, and that we all talked of it afterwards. (Folio 111).

And Mrs. Thayer says: "I heard no words whatever. Mr. Coates and I were conversing together at the time. We talked about it afterwards; merely spoke of it; expressed our sympathy on account of her age, because she was an elderly lady and it was out on the prairie and of course we didn't know how far we were from the depot. (Folio 113)

At the close of the testimony the case was argued, whereupon the Court charged the jury among other things as follows:

"There is nothing in the case to give rise to any suspicion that the agent acted improperly or dishonestly, or that he had any other idea than that he had delivered the ticket to her." (Folio 117).

To which plaintiff duly excepted on the ground that it was not a question of improper or dishonest conduct, but one of negligence.

And also as follows:

"It would seem that the evidence makes a clear case of mistake on the part of the plaintiff and the ticket agent, as to the fact of her not receiving the ticket. (Folio 117).

To which the plaintiff excepted for the reason that the ticket agent was bound to exercise the utmost care and diligence, while the plaintiff was only liable for ordinary care, and there could not be any mutality of mistake. And also as follows:

"The jury has heard the testimony of the plaintiff in regard to what took place and heard the testimony of the conductor as to what took place. It is for the jury to say whether it would not have been perfectly reasonable and proper for the conductor to have given the advice which he says he did, if the facts were as they supposed they were, that she had lost the ticket. It will be for you to consider, under the circumstances, if the facts were as they supposed they were, what the plaintiff would naturally wish to do and what advice would be best for the conductor to give her. He says he advised her if she had bought a ticket to Chicago and had lost it that she had better go back and search for it, and his evidence tends to show that in pursuance of that advice she got off the train to go back and look for her ticket. Of course, if the plaintiff and the conductor had understood the real facts of the case that would not have been the best advice, but under the false impression as to the fact of her having lost the ticket it will be for the jury to say whether under all circumstances that would not have been the best thing for the woman to do." (Folio 124).

To which the plaintiff excepted; for the reason that the real question made by the pleadings and evidence was, that it was gross negligence in the conductor, stopping his train in the place he did, and permitting the plaintiff to get off, as claimed by him, or putting her off, as claimed by her, in her infirm and feeble condition and under the circumstances. And also as follows:

"In regard to the question of demanding her fare, the demanding of her ticket in the first instance undoubtedly was a sufficient demanding of her fare; that was sufficient in the first instance; when he came around to her seat and asked her for her ticket that was equivalent to demanding her fare. If she hadn't a ticket she could pay money. But after they looked for the ticket, as the defendant's evideuce tends to show they did—her evidence tends to show she looked for it and the conductor did not—but after they or she had looked for the ticket and ascertained that it could not be found; that she had lost it or they

supposed she had lost it. If after that you find that the conductor refused to allow her to pay her fare or forced her off without giving her a reasonable chance or opportunity to pay her fare, the company no doubt would be liable. There is no evidence in the case to show that she offered to pay her fare; not a particle." (Folio 129)

To which the plaintiff excepted for the reason that the plaintiff having money and being willing to pay her fare was not a tresspasser, and could not be put off the train as such until the conductor after being told that she had lost her ticket, had made a demand that she pay her fare, stating to her the amount necessary, and she had refused to pay it.

Whereupon the jury retired and returned a verdict for the defendant.

That thereupon the plaintiff by her counsel immediately upon the rendition of the verdict moved the court to set aside the verdict, and moved a new trial on the ground that the verdict was contrary to law and evidence and for misdirection of the jury.

That said motion was duly argued before the court, whereupon the court made an order overruling said motion, and granted judgment on the verdict rendered, to which the plaintiff, by her counsel, duly accepted.

And counsel for the plaintiff claims that under the law of the land and the undisputed facts in this case, as shown by the evidence, that the plaintiff was entitled to recover, and the only question to be determined, was the amount of damages to which she was entitled; that the verdict and the judgment entered thereon has neither evidence nor law to support it, for it is undisputed,

1. That the plaintiff was put off the defendant company's train at a time and place and under circumstances which resulted in serious personal injury to her.

2. That each and every act, circumstance and event from the time that she applied for her ticket, down to her removal from the train, which culminated in her injuries, were each and all caused by the carelessness and negligence of the ticket agent at Edgerton, and afterwards by the act of the conductor.

The plaintiff being entitled to a judgement for something under the undisputed evidence and the law of the land, the trial court was bound to set the verdict aside on the plaintiff's motion. It was not a case in which he had any discretion; and having no discretion, but having refused to do what he was under the law bound to do, the judgment rendered on said verdict must be reversed.

3. That the court erroneously instructed the jury and in effect took the plaintiff's case from the jury.

The bill of exceptions herein, contains all the testimony, and was signed by the judge of the trial court by the consent and on stipulation of the parties.

ARGUMENT.

Before arriving at Edgerton the conductor told the plaintiff he would give her sufficient time to buy a ticket, and when the train stopped she did everything necessary to be done by her to that end. She applied to the agent for a ticket and paid him for one, and he was bound to deliver her the ticket. And the law required of the agent in the exercise of his duty, which in this case was the delivery to the plaintiff of a proper ticket, and in seeing that she got it, the highest care and diligence; while it only required ordinary care of the plaintiff. That he had ample time to have done so appears from his own testimony; for after the plaintiff turned away from the office window, he picked up plaintiff's parasol and stepped after her and handed it to her. The duty of the plaintiff was to pay her fare, and then give her attention to the train, and be watchful for the call, "All aboard," so as to get on in due time. She attended to her duties; the agent neglected his; and instead of dropping her ticket into her open hand, with her change as she supposed he had done, threw it into a drawer in his safe. The conductor having called, "all aboard," before the plaintiff got her change, she went out to the train very hastily and without a ticket, wholly through the fault of the company's agents. A passenger, and especially where that passenger is a woman, is compelled to trust and confide implicitly, in the attention, skill, fidelity, intelligence and prompt action of the agents of the road. And what the ticket agent did in taking her money, giving her the necessary change and picking up and handing her her parasol, tended to confirm her in the belief, that she had her ticket. She had no time or opportunity to inspect what the agent had given her, either to see whether he had given her the correct change, or to take any note of what he had in fact given her. In the haste required by the conductor, she was compelled to thrust it into her duster pocket and had no opportunity to inspect it until she was on the train and the train was in motion. So that the failure to get a ticket was wholly the fault of the defendant company's agents and in no respect the plaintiff's fault.

Under the plaintiff's testimony, the ejection of the plaintiff at the time and place and under the circumstances was a gross outrage, and

unjustifiable on any ground. She says she was ready and willing to pay her fare and that she would have gladly repaid her fare if any such suggestion had been made, or opportunity given her to pay it; but that no demand was made and no opportunity whatever was given her to pay it. And we submit that the ejection of an old invalid, crippled woman from a railroad train, under the circumstances detailed by her, and at the time and place, can not have any legal justification.

But the defendant is also liable on its own testimony. The conductor says he advised her to get off and go back and hunt her ticket, and that she got off in accordance with his advice. He wrote Mr. Underwood an account of the affair, directly after it occured, in which he says as follows: (Folio 113).

"I went back to collect tickets and she was the first one I came to, and she could not find her ticket; and I looked for it through the seat she said, "What will I do?" AND I PULLED THE BELL TO STOP and then advised her to return and see if she could find it, or she could go and get another at Fulda."

The brakeman, Loren Tenny, says: (Folio 102).

"The conductor stood there, he kind of straightened up and asked her what she was going to do. She says, "I don't know." He said my advice is for you to go back. Maybe your daughter has got the ticket. SHE DID NOT SAY ANYTHING TO THAT. He reached up and and pulled the bell cord and told me to assist that lady in getting off the car and take her baggage."

Now take these statements of the conductor and brakeman as true and accurate, and they show the plaintiff completely confused and embarassed, and utterly fail to show any consent on her part to get off or to be put off.

The brakeman expressly says she made no reply when the conductor advised her to get off, and that he pulled the bell cord and told him to take her baggage and assist her off.

Now we submit that this testimony does not contradict the plaintiff's testimony that she did not consent to get off and was put off against her will, when she had money and was willing to pay her fare over again.

But concede that she did consent, in accordance with the conductor's advice, to get off and go back to hunt her ticket. Yet she had no choice as to the place of getting off, but must submit to the will of the conductor. He ran the train past the east end of the high, long trestle bridge spoken of by the witnesses, and put her and her baggage off there and told her to walk back along the track. She did not select the place, and had no opportunity to select it, and did not know its character, as the conductor did. And her injuries resulted largely from being compelled in her crippled, nervous condition to walk back over this bridge and carry her heavy baggage in the heat of the day.

Now it is elementary law that aged and infirm persons and children must not be put off a train, except at stations.

To have put a child off in such a place, or even permitted it to get off, where it must go back over such place, would be the grossest negligence. And it was equally as gross negligence, to put off or permit to get off, a lady of the age the plaintiff was, and crippled and infirm as she was, and perplexed, confused and embarassed as she was, even under the defendant's testimony, and direct her to go back over such a bridge and carry such a load.

The conductor could easily and quickly have backed the train to the west end of the bridge and let her off there, and then her injuries would not have occurred; for the evidence shows that it was in crossing the bridge that her injuries were received. This is not disputed, so that even under the defendant's evidence the injuries received were the result of the conductor's negligence, in a matter in which the plaintiff had no choice whatever, and wherein the conductor was bound to exercise the greatest care and caution, but in which he was guilty of gross negligence.

For as laid down by the Court in Philadelphia & R. R. R., vs. Darby 14 How. (U. S.) 468. "Public policy and safety require that they (carriers of passengers) be held to the greatest possible care and diligence—and the personal safety of passengers should not be left to the sport of chance or the negligence or carelessness of agents. Any negligence in such a case may well deserve the epithet, of "Gross."

It follows that the plaintiff, under the undisputed testimony and the law, was entitled to a verdict; and the verdict being against her, she has a legal right to have the verdict set aside and a new trial granted.

In the language of the Court in Hall vs. Page 48 Am. Dec. 240 (4 Ga. 428): "If the finding of the jury be clearly against evidence, or manifestly without evidence, the Court has no discretion, but is bound in law to grant a new trial. There is nothing in the laws, the Constitution or in Magna Charta, or in the great principles of jury trials which can justify, or for a moment tolerate, a verdict without evidence or contrary to all evidence. The law will permit no such verdict; the juries have no power to render it, and no Court should permit it to stand. You can not predicate discretion of such a case. It is a case where there is none."

Bright vs. Eynon 1 Rum 393. 1 Lidd Pr 905.

We are aware that this Court has held in several cases that the refusal of a motion for a new trial is not subject to review in this Court; but those decisions are all put on the ground that the granting or refusing of such motion was a matter of discretion in the trial Court.

But this case does not come within that rule, for the reason that

the verdict rendered being unwarranted by the law or evidence, it was the bounden duty of the trial Court to set it aside, as laid down in Hall vs. Page SUPRA. And the refusal of the trial Court to set the verdict aside, was a denial of a strict right; and this fact takes this case out of the rule above refered to.

In the same line of thought with the case above cited in 48 Am. Dec. and authorities there cited, which is elementary law in this country as old as the common law, we refer to Section 9 of Article I of the State Constitution of the State of Wisconsin, which is as follows:

"Every person is entitled to a certain remedy in the laws, for all injuries, or wrongs which he may receive in his person, property, or character. He ought to obtain justice freely without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws."

This is only declaratory of the common law as old Magna Charta, as the above authorities show.

When the plaintiff in error commenced this action in the State Courts of Wisconsin although a citizen of Illinois she became clothed with the habilaments of the above Bill of Rights and can not be divested of them simply because the defendant under the laws of Congress removed the caused to the Federal Court as a trial court.

The Federal Court as a trial court has no more discretion than the State Court.

Where the plaintiff shows a clear right to damages not contradicted by the defendant's evidence and the verdict is contrary to the evidence, it is a denial of a right.

The remedy at common law is to apply to the trial Court to set aside the verdict and grant a new trial, and if the trial Court denies the application that is the denial of a right.

The common law directs that the party whose right is thus denied has a right to have the error of the trial Court set aside on writ of error. Else the vested right is nothing.

These rights were guaranteed to all litigants in Wisconsin Courts by the Act of Congress of 1848, approving the Constitution of Wisconsin and admitting the State into the Union.

This Court held in McAllister vs. Kuhn 96 U. S., 78, and in Cragin vs. Lovell, 109 U. S., 94, that it will reverse a judgement rendered on default, where the declaration fails to set forth a cause of action. With more reason should a judgmgnt based on the verdict of a jury, rendered contrary to the evidence, be set aside.

Again it is undisputed that a tender of fare was made by plaintiff's friends who were on the rear car, before the train started and while Mrs. Fishburn and the brakeman were on the ground. Mr. Ask, Kingsbury and Pickett all offered to pay her fare.

Mr. Birkdall testifies, and the conductor does not dispute it, that the conductor told him when he gave him an account of the affair a few days following that "some persons on the train offered to pay her fare after she got off, but he said to me as the train was starting he did not want to keep the train there any longer." (Folio 84).

The conductor himself says (Folio 97); "After she was off those gentlemen came through the car and said, 'don't put that lady off; we pay her fare'—or something to that effect. At this time I was standing on the platform of the baggage car, Mrs. Fishburn and the brakeman were on the ground, these gentlemen were on the platform of the baggage car, and the train was standing still."

Now under these circumstances the conductor was bound to receive the fare and take Mrs. Fishburn back on the train.

In South Carolina R. R. Co., vs. Nix 68, Ga, 272, it is expressly held that if a passenger be ejected from a train for failure to pay his fare, and while the train is standing still he tenders it, the conductor is bound to receive the fare and admit the passenger.

And whether this tender is made by the passenger or by some other person, is immaterial.

O'Brien vs. N. Y. Cent. & Hud. R. R. R. Co. 80 N. Y. 238.
Louisville & Nashville R. R. Co. vs. Garrett 8 Lea (Tenn) 438.
3rd Amer. & Eng. R. R. Cases 416.
Gould vs. Chi. Mil. & St. Paul R'y Co. 18 Fed. Rep 155.
Nelson vs. Long Island R. R. Co. 7 Hun (N. Y.) 140.

II.

The charge of the Court as quoted SUPRA, was clearly erroneous.

The complaint of the plaintiff charges the defendant company:

1. With gross negligence by its ticket agent at Edgerton, in the State of Minnesota in not delivering a ticket paid for; and the conductor with negligence in not giving sufficient time for the plaintiff to procure a ticket.

2. In putting her off at a place where there was imminent danger of great bodily harm to an old, invalid lady.

3. With unlawfully expelling her from the cars without giving her an opportunity to day her fare.

These three propositions, are all stated in the complaint, each making a constituent part of one cause of action, being a special action

on the case at common law, and we submit that the complaint is sustained by the evidence in every particular.

Now the Court by its charge took from the consideration of the jury the first and last of these propositions and submitted only the second one, and that in a manner prejudicial and erroneous.

Under the first grievance set forth in the complaint there is no dispute, but that the conductor contracted to hold the train at Edgerton until the plaintiff could purchase a ticket to Chicago. And it is clear from the testimony of the plaintiff and her daughter, and from the admission of both the agent and the conductor, that the conductor went into the office with her, and saw her pay her fare to Chicago. It is undisputed that the agent, instead of delivering her the ticket paid for, negligently and carelessly threw it into the drawer of his safe with the bill given him by the plaintiff, and that he gave her the change in such a way as to induce her to believe the ticket was with the change. It is also undisputed that just as the bill was handed the agent by the plaintiff, that the conductor called, "all aboard," and hurried her on the train, without giving her any time to see what change the agent had given her, or whether she had her ticket or not.

And yet the learned District Judge in his charge, entirely exculpates the defendant company of any negligence or breach of duty.

He says, "There is nothing in the case to give rise to any suspicion that the agent acted improperly or dishonestly, etc. It would seem that the evidence makes a clear case of mistake, mutual mistake, etc." (See Record Folio 117), and again, "If the jury believes from all the evidence that there was a mutual mistake, the conductor would not have been under obligation to have carried the woman." (Folio 125)

Now thus exculpating the defendant company and calling its failure to deliver the plaintiff a ticket she had asked for and paid for, "a mutual mistake," was clearly error. For either the agent or conductor, or both, were guilty of gross negligence, in not seeing that the lady received her ticket, under the circumstances. And this negligence contributed directly to the injury complained of. The law requires the highest degree of diligence, on part of the defendant Company in such a case, and only ordinary diligence on part of the passenger.

In the case of the Chicago, Burlington & Quincy R. R. Co. vs. Parks 28 Ill. 48 Am. Dec. 562, the Court say:

"The Company must see to it, that the fault was not that of its own agents, instead of the passenger; they must provide a convenient and accessible place for the sale of tickets, with a competent person in attendance, ready to sell them, which should be open and accessible to all passengers for a reasonable time before the departure of each train, and up to the time of its actual departure, so that it shall be really a case of neglect and not of necessity on part of the passenger, and not the fault of the Company."

The Court, in telling the jury (in the case at bar) that this was a case of mutual mistake and the defendant Company not to blame, and thus relieving the Company from the result of its negligence is clearly error.

That the highest degree of diligence is required of a railroad company see—

McElroy vs. Nashua & L. R. R. 4 Cush. 400.
Warren vs. Fitchburg R. R. 8 Allen 233.
Eaton vs. Boston & L. R. R. 11 Allen 505.
Jamison vs. San Jose & J. C. R. R. 55. Cal. 598.
Phila. & R. R. R. vs. Darby 14 How. (U. S.) 468.

In the last case the Court say:

"When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require, that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of passengers should not be left to the sport of chance, or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of 'gross.'"

That passengers are only required to exercise ordinary negligence see—

Thompson on Carriers of Passengers 257.
Shear. & Red. on Neg. Sect. 25.
2 Thompson on Neg. 1148.

In a case in the Wisconsin Supreme Court in 1885, Yorton vs. Mil. L. Shore & W. R. R., the plaintiff purchased a ticket from Marion to Oshkosh, when the conductor called for the ticket the plaintiff informed him he desired to stop over at Clintonville, and requested a stop-over check. The conductor, by mistake, gave him a trip check, instead.

The plaintiff received the trip check supposing it a stop-over check, but did not read it to determine what it was in fact, until after he had taken the train at Clintonville to go on to Oshkosh. When this was tendered the second conductor, it was refused and the plaintiff was informed he must pay his fare or leave the train, stating the amount. The plaintiff refused to repay his fare and was put off the train at the next station; and the Company was held liable for damages, because of the first conductor's mistake.

And the rule followed in that case is clearly the law of the land.

The relations of the plaintiff and the conductor and ticket agent were not mutual; and mutality of negligence as a matter of law, did not and could not exist.

The plaintiff had paid her money for her ticket and the Company was bound to deliver it. The agent had both time and opportunity to deliver it and could have done so had he exercised even ordinary care. If the agent was prevented by the haste of the conductor, then

the conductor is to blame. In either case the plaintiff was not to blame as she had nothing to do with the delivery of the ticket; and she could not prevent the haste of the conductor or the negligence of the agent.

And yet the Court tells the jury that because the plaintiff supposed she had her ticket, and because the agent supposed he had given it to her, this was no negligence, only a "mutual mistake." If this be so then the mutual belief of the plaintiff and agent that she had her ticket, releives the Company from its duty to deliver the ticket, which is absurd. This error alone entitles the plaintiff to a new trial.

III.

The second error in the charge excepted to is that part relating to the conductor's evidence that he advised the plaintiff to get off and go back and search for her ticket, and that she got off in accordance with his advice.

The Court says: (Folio 124) "It is for the jury to say whether it would not have been perfectly reasonable and proper for the conductor to have given the advice he says he did, if the facts were as they supposed they were, that she had lost her ticket."

And again, "But under the false impression as to the fact of her having lost her ticket, it will be for the jury to say whether under all the circumstances that would not have been the best thing for the woman to do."

Now the real question raised by the pleadings and the evidence on this point is, that it was gross negligence in the conductor stopping his train at the east end of the trestle bridge, and putting her off at that point, in her infirm and crippled condition, where it was necessary for her, in order to get back, to walk over this high bridge by stepping from tie to tie, and carry her baggage, in the hot sun.

Being an aged woman, crippled and infirm, perplexed, confused and embarassed as she was, even under the defendant's evidence, and completely dazed as it were, under her own, it was gross negligence, to advise her to get off at the place where she was put off, under the circumstances, or even to permit her to get off had she requested it.

The right to put a passenger off a train where they will be exposed to peril and danger, does not exist.

And it is elementary law, that aged and infirm persons must not be put off except at stations.

The rule is laid down by II Rorer on Railroads 961, as follows:

"In case, however, the passenger be sick or aged, or lame, or a child or a delicate woman, the expulsion should never be elsewhere than at a regular station.

"It is laid down as a rule of law, that sick or aged persons, delicate women, persons lame or infirm and children are entitled to more care and attention and we may add, more tolerance and kindness from the Company's servants than persons of good health and laboring under no disabilities or infirmities."

And see Sheridan vs. Brooklyn & Newton R. R. 36 N. Y. 39.

Putting a young child off in such a place, and compelling it to walk back over such a bridge would be the grossest negligence. And the plaintiff in her weak, crippled and dazed condition was entitled to as much consideration and called for the exercise of the greatest care on part of the conductor.

IV.

Another error complained of is that the Court took the case away from the jury in that portion of his charge relating to the demand of the fare.

The Court first charges the jury (Folio 126) that if the conductor demanded that she pay her fare and gave her reasonable opportunity to do so, and she did not do it, then their verdict should be for the defendant. And again (in folio 129) tells them that demanding her ticket in the first instance "was a sufficient demand of her fare," "was equivalent to demanding her fare."

Now the evidence is clear and undisputed, that the only demand of fare made by the conductor, was when he asked her for her ticket when he first came in the car, and that her reply was that she had lost it. It is not claimed or even pretended that he then told her she must pay her fare if she had lost her ticket.

Nothing whatever was said by the conductor about paying her fare again, so that there was neither a demand, nor a refusal. If asking the plaintiff for her ticket in the first instance was a sufficient demand that she pay a second fare, as charged by the Court, and that she must then pay her fare or offer to pay, or the conductor would be justified in ejecting her, is the law of the land, then the plaintiff had no case.

For there is no dispute, but that he asked her for her ticket when he came into the car, and this being so, under the charge of the Court, the conductor has done his full duty. The plaintiff says she would have been too glad to have paid her fare again, had she had opportunity, or understood she could do so, but she makes no claim that she offered to pay. Her friends on the next car did make such offer after she was on the ground, which offer the conductor rejected.

Thus, under the undisputed evidence, if the Court gave the law correctly, the jury could not do otherwise than find for the defendant.

That simply asking for a ticket by the conductor where a passenger has lost his ticket and is searching for it, when the conductor makes the request, is a sufficient demand of fare, to entitle the conductor to eject the passenger, is not the law.

The plaintiff says she was consoling herself with the thought, that the conductor had seen her buy her ticket, and would be merciful to her, that she had money to pay her fare and would gladly have done so, had it been demanded. She was not a trespasser on the train, because she had no ticket. She would only become such on a demand and refusal to produce a ticket or pay her fare.

It was the bounden duty of the conductor, when informed that she had lost her ticket, to make a second demand that she pay her fare, and state the amount, which he does not claim to have done, and he had no right to put her off until such demand had been made and refused.

There are multitudes of passengers, and especially among ladies, who would not know, that they had a right to remain on the train if they had lost their tickets, and it is most reasonable and proper, as the law is, that there must be a formal demand of fare and refusal, before a conductor can be permitted to put a passenger off the train.

All the authorities recognize the rule, and no case can be found sustaining the rule given to the jury by the Court: any such rule would be most unwise and dangerous, and especially so when applied to women and children, or persons not accustomed to ride much on trains.

In Frederick vs. Balt. & O. R. R. Co. 53 Md. 201, it is held that where the holder of a commutation ticket, to be used only by the person to whom it is issued, allows another to use it, it may on presentation by another person, be taken up and forfeited, and that after a demand upon the person so presenting the ticket, for fare and a refusal by him to pay, the expulsion from the train is justifiable.

To the same effect are the following cases:

Toledo R. R. Co. vs. McDonough 53 Md. 289.
Townsend vs. N. Y. R. R. Co. 56 N. Y. 295.
Shelton vs. L. S. R. R. Co. 29 Ohio St. 214.
Logan vs H. & St. J. R. R. 67 Mo. 663.
Bradshaw vs. South Boston R. R. Co. 235 Mass. 407.
Houstan & Texas R. R. Co. vs. Ford 53 Tex. 364.
Louisville N. etc. R. R. vs. Harris 9 Lou. 180.

We therefore respectfully submit that the Court both on the law and evidence should have granted the motion of the plaintiff for a new trial, and the refusal to grant such motion should be reversed and the case sent back for a new trial.

All of which is respectfully submitted.

I. C. SLOAN,
B. DUNWIDDIE and
B. F. DUNWIDDIE,
Plaintiff's Attorneys.

Supreme Court of the United States.

October Term, 1889.

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No. 330.

—o—

CATHERINE FISBURN, PLAINTIFF IN ERROR,

vs.

THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO.

BRIEF OF PLAINTIFF IN ERROR.

B. F. DUNWIDDIE,
Attorney for Plaintiff in Error.

In Supreme Court of the United States.

CATHERINE FISHBURN, PLAINTIFF IN ERROR,

—VS—

THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO.,
DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

BRIEF OF PLAINTIFF IN ERROR.

This action was brought by the plaintiff in error, a resident of the State of Illinois, against the defendant in error, a railway corporation, for an unlawful ejection from a passenger train of the defendant, on the 24th day of July, 1884, while riding on the defendant's train from Edgerton, in the State of Minnesota. The action was originally commenced in the Circuit Court of Green County, State of Wisconsin, in August, 1885; and on the 6th day of October, 1885, the defendant company filed with the Clerk of the Circuit Court for Green County, a petition for the removal of the action to the Circuit Court of the United States for the Western District of Wisconsin, (Record folio 23) and an order was made, based on said petition, on the 6th day of October, 1885, removing said action into the Circuit Court of the United States for the Western District of Wisconsin; and the action was afterward tried in said Circuit Court of the United States.

The Complaint is drawn under the Wisconsin code, and charges the defendant corporation:

I. With gross negligence by its ticket agent at Edgerton, Pipestone County, in the State of Minnesota, in not delivering to the plain-

tiff a ticket paid for, and the conductor with negligence in not giving her sufficient time to procure a ticket.

II. In putting her off its passenger train at a place where there was immediate danger of great bodily harm to her, she being an invalid lady.

III. With unlawfully expelling plaintiff from the cars of the defendant company without giving her an opportunity to pay her fare. (Record folios 5 to 11.)

These three propositions are each and all stated in the complaint, each making a constituent part of the one cause of action, being a special action on the case at common law, and although framed under the Wisconsin Code of procedure, yet it is modeled in every particular after a complaint in a special action on the case at common law.

STATEMENT OF FACTS.

From the evidence it appears that the plaintiff at the time of the injury complained of, and at the time of the trial of the action, resided at Orangeville, Ill., a small village north of Freeport, in the northwestern part of the State; that she had been an invalid for over 25 years, suffering from nervous debility and rheumatism, and that her hands and feet were twisted and distorted out of shape, and very sensitive to any touch, shock or excitement. (Record, Folios 59, 63 and 67.)

That for some months prior to the injury complained of she had been stopping with her daughter, at Edgerton, Minnesota, for her health and was getting better—better than she had been for some years prior. (Folio 62.)

That in the latter part of July, 1884, it became necessary for her to return home to attend to some important business, and she accordingly arranged to start on the 24th of July, 1884, and had written her husband to meet her at the railroad station, which was twelve miles from Orangeville, her place of residence. (Folios 57 and 62.)

That on the morning of July 24, 1884, having some business at Pipestone, a small station west of Edgerton, she took the 8 o'clock freight and went to Pipestone intending to return to Edgerton on the 1 o'clock freight that afternoon and then take the 4 o'clock P. M. passenger at Edgerton for home. But the freight train on which she had expected to return to Edgerton, was late, and she had to wait for the passenger, on which she had arranged to go home on. When the conductor came to take up her ticket from Pipestone to Edgerton, she explained to him her situation and her desire to go on home on his train, and asked him if he would give her time to get off and get her ticket, when the train should reach Edgerton, and he told her he would. (Folio 58.)

When the train reached Edgerton the plaintiff got off to get her ticket, and both the plaintiff and the conductor informed the ticket agent of her desire to purchase a ticket. (Folio 58)

The plaintiff and her daughter, who was at the depot with her mother's baggage, when the train arrived and who went into the ticket office with her, both testify that the conductor went to the ticket office window with the plaintiff and saw her pay for her ticket; (Folio 58 and 70) but this the conductor denies on the trial; (Folio 95), but he does not deny that he told A. R. Burkdall, an editor at Edgerton, a few days after the occurrence, that he did go into the office with her at Edgerton and saw her hand the agent some money and ask for a ticket, a fact which Mr. Burkdall testifies to (Folio 84); the ticket agent,

Smith, testifies that he did not see him in the office, but he also admits that he wrote Mr. Hinsey, his Superintendent, on the same day of the injury, an account of the affair, in which he undertook to make a correct statement, that the plaintiff "Mrs. Kate Fishburn got off train No. 4 and in company with conductor Thomas came into my office and called for a ticket to Chicago." (Folio 106.)

So that if the question is very material as to whether the conductor did in fact see her pay for her ticket or not, the affirmative testimony of Mrs. Fishburn and her daughter, corroborated by the conductor's admission to Burkdall, and the agent's admission in his letter to Mr. Hinsey, both made at or near the time, would seem to establish the fact affirmatively, notwithstanding the conductor's contrary testimony.

It is undisputed that the agent prepared and stamped a ticket and had it in his hand ready to deliver, when the plaintiff handed him a $20 bill; that the agent took the bill and turned to go to his safe for the change; about this time the conductor called out "all aboard;" that the plaintiff's daughter then said, "Hurry up Mr. Smith or mother will get left." That the agent stepped back to his safe, and threw the ticket he had prepared, and the $20 bill, both into a drawer in the safe, (Folio 105) took out the necessary change, some $7, partly in bills and partly in silver, (Folio 65), stepped back to the window where the plaintiff was waiting, and dropped it into the open and outstretched hand of the plaintiff, who supposing the ticket was with the money in her hand and being afraid the train would start, closed her hand upon it, turned about and started hastily for the train, dropping her change and as she supposed, her ticket, without any examination, loose into the pocket of a duster she had on, as she hastened towards the train. (Folio 59 and 65.) In her haste and fear of being left, she left her parasol lying on the office window, which the agent Smith picked up and ran after her and handed to her. (Folio 104 and 59.) There is no dispute in the testimony thus far except that the conductor denies that he saw the plaintiff pay for her ticket; he also denies that the plaintiff's daughter asked him in the office to help her mother change at Ramsay, as she was an invalid from rheumatism, to which the daughter testified. (Folio 70.)

As soon as the plaintiff got on the train and got seated she says she took her change out of her duster pocket and put it in her pocket book, and not finding her ticket began to look for it through her baggage and on the floor, thinking she might have dropped it, but consoling herself, as she says, that the conductor saw her buy her ticket and pay for it, and that he would be merciful to her; and while still looking for her ticket the conductor came in and up to the seat where she was, and she told him she was afraid she had lost her ticket; (Folio 60 and 66.) That as soon as she told him this, he in an ugly manner said to her, "You must get right off then," and immediately pulled the bell cord and the train began to slack up. That she was so shocked and surprised, that she just stood and looked at him; that the train

came nearly to a standstill and then started up again and commenced to go faster and faster when the conductor seized the bell rope again and pulled it violently, telling her at the same time to get her baggage and get off. That she replied, "Well I can't," and sank down on the seat; that just then the brakeman came in and the conductor told him to "Get this woman off here." That the brakeman picked up her baggage and walked to the door of the car, and that the conductor put his hand on her shoulder and urged her along toward the door of the car, and as soon as the train came to a standstill, out of the door; that the brakeman then got down on the ground and helped her down, when the conductor told her she could walk back. (Folio 60-61.)

The conductor's account of the occurrence is that when she told him she had lost her ticket that he said, "If I was in your place and had bought a ticket to Chicago I would get off and go back and try to find it. Says I, your daughter may have the ticket; she was in the ticket office with you; very likely you will find the ticket by going back, or you can go on to Fulda and buy another ticket from there to Chicago." That he then reached up and pulled the bell cord.

But in a letter to the Division Superintendent, written at the time of the occurrence, giving a statement of the matter, he said, "I went back to collect tickets and she was the first one I came to and she could not find her ticket and I looked for it through the seat she was in and said, 'What will I do?' and I pulled the bell to stop AND THEN ADVISED HER TO GET OFF," Etc. (Folio 113.)

The conductor further says that when he pulled the bell cord the train slacked up, but the engineer seeing he was going to stop on the trestle bridge, pulled out again, when he pulled the bell cord again, and the train then came to a full stop at the east end of the bridge, that the brakeman took the plaintiff's baggage at his direction and carried it out, and he walked behind her, and the brakeman helped her off the train; that he then told her to remain where she was until the train pulled out and then she could take the track and walk back to Edgerton. (Folio 95 and 96.)

The brakeman, Loren Tenney, says that when he came in the conductor kind of straightened up and asked her what she was going to do. She says, "I don't know." He said, "My advice is to go back and see if you can't find your ticket. May be your daughter has got the ticket." SHE DID NOT SAY ANYTHING TO THAT. He reached up and pulled the bell cord and told me to assist the lady off the car and take her baggage. I took it and walked out.

That when the plaintiff was on the ground, the conductor told her to stand there until the train passed by and then she could go down the track. (Folio 101.)

That Mrs. Fishburn did not say a word after she got off. (Folio 102.) A Mr. and Mrs. Thayer, who were on the same car, and who came from Howard, Dakota, to testify for the company, say that they

saw no ungentlemanly conduct on part of the conductor and heard no abusive language; yet Mr. Thayer makes the following significant concession: (Folio 111.) "I thought it was very—I thought it was too bad that a lady of her age—as I remember her then, I thought she was older than she is. I MADE THE REMARK I WOULD HATE TO HAVE MY MOTHER PUT OFF THE TRAIN AND THAT WE ALL TALKED OF IT AFTERWARDS." And Mrs. Thayer says: (Folio 113) "I heard no words whatever. Mr. Coates and I were conversing together at the time. We talked about it afterwards; expressed our sympathy on account of her age; because she was an elderly lady, and it was out on the prairie, and of course we did not know how far we were from the depot."

Just after the plaintiff was on the ground and while the train was at a standstill, a Mr. Kingsbury, a Mr. Ask and a Mr. Pickett, all residents of Edgerton, and acquaintances of the plaintiff, and who, unknown to the plaintiff, were on the train in the car behind the one the plaintiff was in, came out on the platform of the car, and seeing Mrs. Fishburn on the ground, Mr. Kingsbury asked the reason, and the conductor replied that she had lost her ticket, and let her go back and hunt it; that he was not going to keep the train there all day waiting for her. (Folio 78.) Mr. Ask and Mr. Pickett both offered to pay her fare but the conductor replied that she had lost her ticket and let her go back and find it, and that he had no time to bother with her. (Folio 79, 84, 86 and 87.)

Mr. Pickett says for fear he was not understood he said again, "We propose to pay her fare." But that the conductor pulled the bell rope and the train pulled out leaving her standing on the ground. That the conductor appeared mad and excited. (Folio 90.) Mr. Burkdall says that the conductor in his account of the matter to him, a few days after the occurrence, said that supposing Mrs. Fishburn had lost her ticket, he told her she had better go back and hunt it and that he stopped the train and let her off. That some persons on the train offered to pay her fare after she was off, but as the train was starting he did not want to keep the train there any longer. That he was put out about the matter as he had delayed the train at Edgerton for her to buy a ticket The conductor does not dispute the testimony of these witnesses. That the train was standing still when the offer to pay plaintiff's fare was made, the conductor admits on the trial. (Folio 97.) He says, (Folio 97) "After she was off those gentlemen came through the car and said, "Don't put that lady off, we will pay her fare," or something to that effect. At this time I was standing on the platform of the baggage car, Mrs. Fishburn and the brakeman were on the ground, these gentlemen on the platform of the coach and the train was at a standstill." The plaintiff says that she had means to pay a second fare and would willingly have done so, had any opportunity have been given her, (Folio 64) and that he did not offer to let her go on to Fulda and get another ticket or say anything of that kind, and that she would have been only too glad to pay her fare again and go on,

had she had an opportunity to do so. And no claim is made that a demand was made of her after she informed the conductor she had lost her ticket, or that the amount of the fare was stated to her. It is also undisputed that the train was stopped, and the plaintiff left at the east end of a long trestle bridge, some 120 feet long and 20 feet high; and that on the north of the road where she was left was an embankment some 15 feet high, while on the south side was a ditch and slough of water so that the plaintiff was compelled in going back to Edgerton to cross this bridge, and as she was directed to do by the conductor. (Folio 87.)

The plaintiff's luggage consisted of a large satchel, a large basket, a large bundle in a shawl strap and a gossamer and a parasol, weighing not less than 30 or 35 pounds and the day was very hot. (Folio 61.)

And the plaintiff humiliated, shocked and distressed, left out on the prairie in the extreme heat of the day, crippled and nervous as she was, attempted to do as the conductor directed, picked up her baggage and started back on the railroad track for the station. But in crossing the long high trestle bridge, stepping from tie to tie and carrying her luggage, she was so overcome with heat and exhaustion, that she was compelled to stop and wait for help; that as a consequence she was made sick and ill and lost all the benefit she had gained by her stay in Minnesota, and had suffered continually from the effects of it afterwards. (Folio 62, 63, 67 and 75.

At the close of the testimony the case was argued, whereupon the Court charged the jury among other things as follows:

"There is nothing in the case to give rise to any suspicion that the agent acted improperly or dishonestly, or that he had any other idea that he had delivered the ticket to her." (Folio 117.)

To which plaintiff duly excepted on the ground that it was not a question of improper or dishonest conduct, but one of negligence.

And also as follows:

"It would seem that the evidence makes a clear case of mistake on the part of the plaintiff and the ticket agent, as to the fact of her not receiving the ticket." (Folio 117.)

To which the plaintiff excepted for the reason that the ticket agent was bound to exercise the utmost care and diligence, while the plaintiff was only liable for ordinary care, and there could not be any mutuality of mistake. And also as follows:

"The jury has heard the testimony of the plaintiff in regard to what took place and heard the testimony of the conductor as to what took place. It is for the jury to say whether it would not have been perfectly reasonable and proper for the conductor to have given the advice which he says he did, if the facts were as they supposed they were, that she had lost the ticket. It will be for you to consider, under the circumstances, if the facts were as they supposed they were, what the plaintiff would naturally wish to do and what advice would

be best for the conductor to give her. He says he advised her if she had bought a ticket to Chicago and had lost it that she had better go back and search for it, and his evidence tends to show that in pursuance of that advice she got off the train to go back and look for her ticket. Of course, if the plaintiff and the conductor had understood the real facts of the case that would not have been the best advice, but under the false impression as to the fact of her having lost the ticket it will be for the jury to say whether under all circumstances that would not have been the best thing for the woman to do." (Folio 124.)

To which the plaintiff excepted; for the reason that the real question made by the pleadings and evidence was, that it was gross negligence in the conductor, stopping his train in the place he did, and permitting the plaintiff to get off, as claimed by him, or putting her off, as claimed by her, in her infirm and feeble condition and under the circumstances. And also as follows:

"In regard to the question of demanding her fare, the demanding of her ticket in the first instance undoubtedly was a sufficient demanding of her fare; that was sufficient in the first instance; when he came around to her seat and asked her for her ticket that was equivalent to demanding her fare. If she hadn't a ticket she could pay money. But after they looked for the ticket, as the defendant's evidence tends to show they did—her evidence tends to show she looked for it and the conductor did not—but after they or she had looked for the ticket and ascertained that it could not be found; that she had lost it or they supposed she had lost it. If after that you find that the conductor refused to allow her to pay her fare or forced her off without giving her a reasonable chance or opportunity to pay her fare, the company no doubt would be liable. There is no evidence in the case to show that she offered to pay her fare; not a particle." (Folio 129.)

To which the plaintiff excepted for the reason that the plaintiff having money and being willing to pay her fare was not a trespasser, and could not be put off the train as such until the conductor after being told that she had lost her ticket, had made a demand that she pay her fare, stating to her the amount necessary, and she had refused to pay it.

Whereupon the jury retired and returned a verdict for the defendant.

That thereupon the plaintiff by her counsel immediately upon the rendition of the verdict moved the court to set aside the verdict, and

moved a new trial on the ground that the verdict was contrary to law and evidence and for misdirection of the jury.

That said motion was duly argued before the court, whereupon the court made an order overruling said motion, and granted judgment on the verdict rendered, to which the plaintiff, by her counsel, duly excepted.

ASSIGNMENT OF ERRORS.

I.

That under the undisputed evidence in the case, and the law of the land, the plaintiff was entitled to recover; and the only question was, the amount of her damages; that the verdict and judgment entered thereon have neither law or evidence to support them; that this being so the trial court was bound, on the plaintiff's motion, to set the verdict aside. It was not a case in which the Court had any discretion; and having no discretion, but having refused to do what, under the law and evidence he was bound to do, the judgment rendered on said verdict must be reversed.

II.

That the Court misdirected the jury in telling them that "There is nothing in the case to give rise to any suspicion that the agent acted improperly or dishonestly, or that he had any other idea than that he had delivered the ticket to her." (Folio 117.) And in telling them "It would seem that the evidence makes a clear case of mistake on the part of the plaintiff and the ticket agent, as to the fact of her not receiving the ticket." These directions taken with the further one that if the jury believe that the failure to deliver the ticket was a mistake, "The conductor would not have been under obligations to have carried the woman" are clearly erroneous and misleading, in that it was not a question of improper or dishonest conduct on part of the agent, nor a question of mutual mistake on part of the plaintiff and agent, but a question of negligence on part of the agent who is held to a high degree of care and diligence, while the plaintiff is only liable for ordinary care.

III.

That the Court also misdirected the jury in telling them as follows: "The jury has heard the testimony of the plaintiff in regard to what took place and heard the testimony of the conductor as to what took place. It is for the jury to say whether it would not have been perfectly reasonable and proper for the conductor to have given the advice which he says he did, if the facts were as they both supposed they were, that she had lost her ticket. It will be for you to consider, under the circumstances, if the facts were as they supposed they were, what the plaintiff would naturally wish to do and what advice would be best for the conductor to give her. He says he advised her if she had bought a ticket to Chicago and had lost it that she had better go back and search for it, and his evidence tends to show that in pursuance of that advise she got off the train to go back and look for her ticket. Of

course, if the plaintiff and the conductor had understood the real facts of the case that would not have been the best advice, but under the false impression as to the fact of her having lost her ticket it will be for the jury to say whether under all circumstances that would not have been the best thing for the woman to do." (Folio 124.)

This direction is vitally misleading, in that the reasonableness and propriety of the advice which the conductor claims to have given, was not in issue or at all material.

The first question was whether the conductor ever gave any such advice; and if he did, then whether it was not gross negligence on his part in stopping the train where he did, way out on the prairie, and at the further end of the high trestle bridge spoken of, and permitting the plaintiff to get off there as claimed by him in her feeble, nervous and crippled condition, where she would have to walk back and carry her luggage in the heat of the day.

IV.

That the Court after telling the jury that if the conductor demanded that she pay her fare and then gave her a reasonable opportunity to do so and she did not do it, then their verdict should be for the defendant, misdirected them by adding to this instruction the following: "In regard to the question of demanding her fare, the demanding of her ticket in the first instance undoubtedly was a sufficient demanding of her fare; was that sufficient in the first instance; when he came around to her seat and asked her for her ticket that was equivalent to demanding her fare. If she hadn't a ticket she could pay money. But after they looked for the ticket, as the defendant's evidence tends to show they did—her evidence tends to show she looked for it and the conductor did not—but after they or she had looked for the ticket and ascertained that it could not be found; that she had lost it or they supposed she had lost it, if after that you find that the conductor refused to allow her to pay her fare or forced her off without giving her a reasonable chance or opportunity to pay her fare, the company no doubt would be liable. There is no evidence in the case to show that she offered to pay her fare not a particle." (Folio 119.)

This instruction is erroneous in this; it is undisputed that no demand of fare was made by the conductor, after being informed by the plaintiff, that she had lost her ticket; nor was the plaintiff informed of the amount of the fare necessary to be paid; and the Court in telling the jury that a demand was not necessary and that reasonable opportunity to pay was sufficient, takes the whole case from the jury.

For as the Court tells the jury in the same connection there is no evidence that she offered to pay her fare, although she does state that she had the money and would have gladly paid it again had she known she could, or had a demand been made.

This instruction of the Court makes the plaintiff a trespasser on the train, and entirely justified the conductor in ejecting the plaintiff from the car.

ARGUMENT.

Before arriving at Edgerton the conductor told the plaintiff he would give her sufficient time to buy a ticket, and when the train stopped she did everything necessary to be done by her to that end. She applied to the agent for a ticket and paid him for one, and he was bound to deliver her the ticket. And the law required of the agent in the exercise of his duty, which in this case was the delivery to the plaintiff of a proper ticket, and in seeing that she got it, the highest care and diligence; while it only required ordinary care of the plaintiff. That he had ample time to have done so appears from his own testimony; for after the plaintiff turned away from the office window, he picked up plaintiff's parasol and stepped after her and handed it to her. The duty of the plaintiff was to pay her fare, and then give her attention to the train, and be watchful for the call, "All aboard," so as to get on in due time. She attended to her duties; the agent neglected his; and instead of dropping her ticket into her open hand, with her change as she supposed he had done, threw it into a drawer in his safe. The conductor having called, "All aboard," before the plaintiff got her change, she went out to the train very hastily and without a ticket, wholly through the fault of the company's agents. A passenger, and especially where that passenger is a woman, is compelled to trust and confide implicitly, in the attention, skill, fidelity, intelligence and prompt action of the agents of the road. And what the ticket agent did in taking her money, giving her the necessary change and picking up and handing her her parasol, tended to confirm her in the belief, that she had her ticket. She had no time or opportunity to inspect what the agent had given her, either to see whether he had given her the correct change, or to take any note of what he had in fact given her. In the haste required by the conductor, she was compelled to thrust it into her duster pocket and had no opportunity to inspect it until she was on the train and the train was in motion. So that the failure to get a ticket was wholly the fault of the defendant company's agents and in no respect the plaintiff's fault.

Under the plaintiff's testimony, the ejection of the plaintiff at the time and place and under the circumstances was a gross outrage, and

unjustifiable on any ground. She says she was ready and willing to pay her fare and that she would have gladly repaid her fare if any such suggestion had been made, or opportunity given her to pay it; but that no demand was made and no opportunity whatever was given her to pay it. And we submit that the ejection of an old invalid, crippled woman from a railroad train, under the circumstances detailed by her, and at the time and place, can not have any legal justification.

But the defendant is also liable on its own testimony. The conductor says he advised her to get off and go back and hunt her ticket, and that she got off in accordance with his advice. He wrote Mr. Underwood an account of the affair, directly after it occured, in which he says as follows: (Folio 113).

"I went back to collect tickets and she was the first one I came to, and she could not find her ticket; and I looked for it through the seat she said, "What will I do?" AND I PULLED THE BELL TO STOP and then advised her to return and see if she could find it, or she could go and get another at Fulda."

The brakeman, Loren Tenny, says: (Folio 102).

"The conductor stood there, he kind of straightened up and asked her what she was going to do. She says, "I don't know." He said my advice is for you to go back. Maybe your daughter has got the ticket. SHE DID NOT SAY ANYTHING TO THAT. He reached up and and pulled the bell cord and told me to assist that lady in getting off the car and take her baggage."

Now take these statements of the conductor and brakeman as true and accurate, and they show the plaintiff completely confused and embarassed, and utterly fail to show any consent on her part to get off or to be put off.

The brakeman expressly says she made no reply when the conductor advised her to get off, and that he pulled the bell cord and told him to take her baggage and assist her off.

Now we submit that this testimony does not contradict the plaintiff's testimony that she did not consent to get off and was put off against her will, when she had money and was willing to pay her fare over again.

But concede that she did consent, in accordance with the conductor's advice, to get off and go back to hunt her ticket. Yet she had no choice as to the place of getting off, but must submit to the will of the conductor. He ran the train past the east end of the high, long trestle bridge spoken of by the witnesses, and put her and her baggage off there and told her to walk back along the track. She did not select the place, and had no opportunity to select it, and did not know its character, as the conductor did. And her injuries resulted largely from being compelled in her crippled, nervous condition to walk back over this bridge and carry her heavy baggage in the heat of the day.

Now it is elementary law that aged and infirm persons and children must not be put off a train, except at stations.

To have put a child off in such a place. or even permitted it to get off, where it must go back over such place, would be the grossest negligence. And it was equally as gross negligence, to put off or permit to get off, a lady of the age the plaintiff was, and crippled and infirm as she was, and perplexed, confused and embarassed as she was, even under the defendant's testimony, and direct her to go back over such a bridge and carry such a load.

The conductor could easily and quickly have backed the train to the west end of the bridge and let her off there, and then her injuries would not have occurred; for the evidence shows that it was in crossing the bridge that her injuries were received. This is not disputed, so that even under the defendant's evidence the injuries received were the result of the conductor's negligence, in a matter in which the plaintiff had no choice whatever, and wherein the conductor was bound to exercise the greatest care and caution, but in which he was guilty of gross negligence.

For as laid down by the Court in Philadelphia & R. R. R., vs. Darby 14 How. (U. S.) 468. "Public policy and safety require that they (carriers of passengers) be held to the greatest possible care and diligence—and the personal safety of passengers should not be left to the sport of chance or the negligence or carelessness of agents. Any negligence in such a case may well deserve the epithet, of "Gross."

It follows that the plaintiff, under the undisputed testimony and the law, was entitled to a verdict; and the verdict being against her, she has a legal right to have the verdict set aside and a new trial granted.

In the language of the Court in Hall vs. Page 48 Am. Dec. 240 (4 Ga. 428): "If the finding of the jury be clearly against evidence, or manifestly without evidence, the Court has no discretion, but is bound in law to grant a new trial. There is nothing in the laws, the Constitution or in Magna Charta, or in the great principles of jury trials which can justify, or for a moment tolerate, a verdict without evidence or contrary to all evidence. The law will permit no such verdict; the juries have no power to render it, and no Court should permit it to stand. You can not predicate discretion of such a case. It is a case where there is none."

Bright vs. Eynon 1 Rum 393. 1 Lidd· Pr 905.

We are aware that this Court has held in several cases that the refusal of a motion for a new trial is not subject to review in this Court; but those decisions are all put on the ground that the granting or refusing of such motion was a matter of discretion in the trial Court.

But this case does not come within that rule, for the reason that

the verdict rendered being unwarranted by the law or evidence, it was the bounden duty of the trial Court to set it aside, as laid down in Hall vs. Page SUPRA. And the refusal of the trial Court to set the verdict aside, was a denial of a strict right; and this fact takes this case out of the rule above refered to.

In the same line of thought with the case above cited in 48 Am. Dec. and authorities there cited, which is elementary law in this country as old as the common law, we refer to Section 9 of Article I of the State Constitution of the State of Wisconsin, which is as follows:

"Every person is entitled to a certain remedy in the laws, for all injuries, or wrongs which he may receive in his person, property, or character. He ought to obtain justice freely without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws."

This is only declaratory of the common law as old Magna Charta, as the above authorities show.

When the plaintiff in error commenced this action in the State Courts of Wisconsin although a citizen of Illinois she became clothed with the habilaments of the above Bill of Rights and can not be divested of them simply because the defendant under the laws of Congress removed the caused to the Federal Court as a trial court.

The Federal Court as a trial court has no more discretion than the State Court.

Where the plaintiff shows a clear right to damages not contradicted by the defendant's evidence and the verdict is contrary to the evidence, it is a denial of a right.

The remedy at common law is to apply to the trial Court to set aside the verdict and grant a new trial, and if the trial Court denies the application that is the denial of a right.

The common law directs that the party whose right is thus denied has a right to have the error of the trial Court set aside on writ of error. Else the vested right is nothing.

These rights were guaranteed to all litigants in Wisconsin Courts by the Act of Congress of 1848, approving the Constitution of Wisconsin and admitting the State into the Union.

This Court held in McAllister vs. Kuhn 96 U. S., 78, and in Cragin vs. Lovell, 109 U. S., 94, that it will reverse a judgement rendered on default, where the declaration fails to set forth a cause of action. With more reason should a judgmgnt based on the verdict of a jury, rendered contrary to the evidence, be set aside.

Again it is undisputed that a tender of fare was made by plaintiff's friends who were on the rear car, before the train started and while Mrs. Fishburn and the brakeman were on the ground. Mr. Ask, Kingsbury and Pickett all offered to pay her fare.

Mr. Birkdall testifies, and the conductor does not dispute it, that the conductor told him when he gave him an account of the affair a few days following that "some persons on the train offered to pay her fare after she got off, but he said to me as the train was starting he did not want to keep the train there any longer." (Folio 84).

The conductor himself says (Folio 97); "After she was off those gentlemen came through the car and said, 'don't put that lady off; we pay her fare'—or something to that effect. At this time I was standing on the platform of the baggage car, Mrs. Fishburn and the brakeman were on the ground, these gentlemen were on the platform of the baggage car, and the train was standing still."

Now under these circumstances the conductor was bound to receive the fare and take Mrs. Fishburn back on the train.

In South Carolina R. R. Co., vs. Nix 68, Ga, 272, it is expressly held that if a passenger be ejected from a train for failure to pay his fare, and while the train is standing still he tenders it, the conductor is bound to receive the fare and admit the passenger.

And whether this tender is made by the passenger or by some other person, is immaterial.

O'Brien vs. N. Y. Cent. & Hud. R. R. R. Co. 80 N. Y. 238.
Louisville & Nashville R. R. Co. vs. Garrett 8 Lea (Tenn) 638.
3rd Amer. & Eng. R. R. Cases 416.
Gould vs. Chi. Mil. & St. Paul R'y Co. 18 Fed. Rep 155.
Nelson vs. Long Island R. R. Co. 7 Hun (N. Y.) 140.

II.

The charge of the Court as quoted SUPRA, was clearly erroneous.

The complaint of the plaintiff charges the defendant company:

1. With gross negligence by its ticket agent at Edgerton, in the State of Minnesota in not delivering a ticket paid for; and the conductor with negligence in not giving sufficient time for the plaintiff to procure a ticket.

2. In putting her off at a place where there was imminent danger of great bodily harm to an old, invalid lady.

3. With unlawfully expelling her from the cars without giving her an opportunity to day her fare.

These three propositions, are all stated in the complaint, each making a constituent part of one cause of action, being a special action

on the case at common law, and we submit that the complaint is sustained by the evidence in every particular.

Now the Court by its charge took from the consideration of the jury the first and last of these propositions and submitted only the second one, and that in a manner prejudicial and erroneous.

Under the first grievance set forth in the complaint there is no dispute, but that the conductor contracted to hold the train at Edgerton until the plaintiff could purchase a ticket to Chicago. And it is clear from the testimony of the plaintiff and her daughter, and from the admission of both the agent and the conductor, that the conductor went into the office with her, and saw her pay her fare to Chicago. It is undisputed that the agent, instead of delivering her the ticket paid for, negligently and carelessly threw it into the drawer of his safe with the bill given him by the plaintiff, and that he gave her the change in such a way as to induce her to believe the ticket was with the change. It is also undisputed that just as the bill was handed the agent by the plaintiff, that the conductor called, "all aboard," and hurried her on the train, without giving her any time to see what change the agent had given her, or whether she had her ticket or not.

And yet the learned District Judge in his charge, entirely exculpates the defendant company of any negligence or breach of duty.

He says, "There is nothing in the case to give rise to any suspicion that the agent acted improperly or dishonestly, etc. It would seem that the evidence makes a clear case of mistake, mutual mistake, etc." (See Record Folio 117), and again, "If the jury believes from all the evidence that there was a mutual mistake, the conductor would not have been under obligation to have carried the woman." (Folio 125)

Now thus exculpating the defendant company and calling its failure to deliver the plaintiff a ticket she had asked for and paid for, "a mutual mistake," was clearly error. For either the agent or conductor, or both, were guilty of gross negligence, in not seeing that the lady received her ticket, under the circumstances. And this negligence contributed directly to the injury complained of. The law requires the highest degree of diligence, on part of the defendant Company in such a case, and only ordinary diligence on part of the passenger.

In the case of the Chicago, Burlington & Quincy R. R. Co. vs. Parks 28 Ill. 48 Am. Dec. 562, the Court say:

"The Company must see to it, that the fault was not that of its own agents, instead of the passenger; they must provide a convenient and accessible place for the sale of tickets, with a competent person in attendance, ready to sell them, which should be open and accessible to all passengers for a reasonable time before the departure of each train, and up to the time of its actual departure, so that it shall be really a case of neglect and not of necessity on part of the passenger, and not the fault of the Company."

The Court, in telling the jury (in the case at bar) that this was a case of mutual mistake and the defendant Company not to blame, and thus relieving the Company from the result of its negligence is clearly error.

That the highest degree of diligence is required of a railroad company see—

McElroy vs. Nashua & L. R. R. 4 Cush. 400.
Warren vs. Fitchburg R. R. 8 Allen 233.
Eaton vs. Boston & L. R. R. 11 Allen 505.
Jamison vs. San Jose & J. C. R. R. 55. Cal. 598.
Phila. & R. R. R. vs. Darby 14 How. (U. S.) 468.

In the last case the Court say:

"When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require, that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of passengers should not be left to the sport of chance, or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of 'gross.'"

That passengers are only required to exercise ordinary negligence see—

Thompson on Carriers of Passengers 257.
Shear. & Red. on Neg. Sect. 25.
2 Thompson on Neg. 1148.

In a case in the Wisconsin Supreme Court in 1885, Yorton vs. Mil. L. Shore & W. R. R., the plaintiff purchased a ticket from Marion to Oshkosh, when the conductor called for the ticket the plaintiff informed him he desired to stop over at Clintonville, and requested a stop-over check. The conductor, by mistake, gave him a trip check, instead.

The plaintiff received the trip check supposing it a stop-over check, but did not read it to determine what it was in fact, until after he had taken the train at Clintonville to go on to Oshkosh. When this was tendered the second conductor, it was refused and the plaintiff was informed he must pay his fare or leave the train, stating the amount. The plaintiff refused to repay his fare and was put off the train at the next station; and the Company was held liable for damages, because of the first conductor's mistake.

And the rule followed in that case is clearly the law of the land.

The relations of the plaintiff and the conductor and ticket agent were not mutual; and mutality of negligence as a matter of law, did not and could not exist.

The plaintiff had paid her money for her ticket and the Company was bound to deliver it. The agent had both time and opportunity to deliver it and could have done so had he exercised even ordinary care. If the agent was prevented by the haste of the conductor, then

the conductor is to blame. In either case the plaintiff was not to blame as she had nothing to do with the delivery of the ticket; and she could not prevent the haste of the conductor or the negligence of the agent.

And yet the Court tells the jury that because the plaintiff supposed she had her ticket, and because the agent supposed he had given it to her, this was no negligence, only a "mutual mistake." If this be so then the mutual belief of the plaintiff and agent that she had her ticket, releives the Company from its duty to deliver the ticket, which is absurd. This error alone entitles the plaintiff to a new trial.

III.

The second error in the charge excepted to is that part relating to the conductor's evidence that he advised the plaintiff to get off and go back and search for her ticket, and that she got off in accordance with his advice.

The Court says: (Folio 124) "It is for the jury to say whether it would not have been perfectly reasonable and proper for the conductor to have given the advice he says he did, if the facts were as they supposed they were, that she had lost her ticket."

And again, "But under the false impression as to the fact of her having lost her ticket, it will be for the jury to say whether under all the circumstances that would not have been the best thing for the woman to do."

Now the real question raised by the pleadings and the evidence on this point is, that it was gross negligence in the conductor stopping his train at the east end of the trestle bridge, and putting her off at that point, in her infirm and crippled condition, where it was necessary for her, in order to get back, to walk over this high bridge by stepping from tie to tie, and carry her baggage, in the hot sun.

Being an aged woman, crippled and infirm, perplexed, confused and embarassed as she was, even under the defendant's evidence, and completely dazed as it were, under her own, it was gross negligence, to advise her to get off at the place where she was put off, under the circumstances, or even to permit her to get off had she requested it.

The right to put a passenger off a train where they will be exposed to peril and danger, does not exist.

And it is elementary law, that aged and infirm persons must not be put off except at stations.

The rule is laid down by II Rorer on Railroads 961, as follows:

"In case, however, the passenger be sick or aged, or lame, or a child or a delicate woman, the expulsion should never be elsewhere than at a regular station.

"It is laid down as a rule of law, that sick or aged persons, delicate women, persons lame or infirm and children are entitled to more care and attention and we may add, more tolerance and kindness from the Company's servants than persons of good health and laboring under no disabilities or infirmities."

And see Sheridan vs. Brooklyn & Newton R. R. 36 N. Y. 39.

Putting a young child off in such a place, and compelling it to walk back over such a bridge would be the grossest negligence. And the plaintiff in her weak, crippled and dazed condition was entitled to as much consideration and called for the exercise of the greatest care on part of the conductor.

IV.

Another error complained of is that the Court took the case away from the jury in that portion of his charge relating to the demand of the fare.

The Court first charges the jury (Folio 126) that if the conductor demanded that she pay her fare and gave her reasonable opportunity to do so, and she did not do it, then their verdict should be for the defendant. And again (in folio 129) tells them that demanding her ticket in the first instance "was a sufficient demand of her fare," "was equivalent to demanding her fare."

Now the evidence is clear and undisputed, that the only demand of fare made by the conductor, was when he asked her for her ticket when he first came in the car, and that her reply was that she had lost it. It is not claimed or even pretended that he then told her she must pay her fare if she had lost her ticket.

Nothing whatever was said by the conductor about paying her fare again, so that there was neither a demand, nor a refusal. If asking the plaintiff for her ticket in the first instance was a sufficient demand that she pay a second fare, as charged by the Court, and that she must then pay her fare or offer to pay, or the conductor would be justified in ejecting her, is the law of the land, then the plaintiff had no case.

For there is no dispute, but that he asked her for her ticket when he came into the car, and this being so, under the charge of the Court, the conductor has done his full duty. The plaintiff says she would have been too glad to have paid her fare again, had she had opportunity, or understood she could do so, but she makes no claim that she offered to pay. Her friends on the next car did make such offer after she was on the ground, which offer the conductor rejected.

Thus, under the undisputed evidence, if the Court gave the law correctly, the jury could not do otherwise than find for the defendant.

That simply asking for a ticket by the conductor where a passenger has lost his ticket and is searching for it, when the conductor makes the request, is a sufficient demand of fare, to entitle the conductor to eject the passenger, is not the law.

The plaintiff says she was consoling herself with the thought, that the conductor had seen her buy her ticket, and would be merciful to her, that she had money to pay her fare and would gladly have done so, had it been demanded. She was not a trespasser on the train, because she had no ticket. She would only become such on a demand and refusal to produce a ticket or pay her fare.

It was the bounden duty of the conductor, when informed that she had lost her ticket, to make a second demand that she pay her fare, and state the amount, which he does not claim to have done, and he had no right to put her off until such demand had been made and refused.

There are multitudes of passengers, and especially among ladies, who would not know, that they had a right to remain on the train if they had lost their tickets, and it is most reasonable and proper, as the law is, that there must be a formal demand of fare and refusal, before a conductor can be permitted to put a passenger off the train.

All the authorities recognize the rule, and no case can be found sustaining the rule given to the jury by the Court; any such rule would be most unwise and dangerous, and especially so when applied to women and children, or persons not accustomed to ride much on trains.

In Frederick vs. Balt. & O. R. R. Co. 53 Md. 201, it is held that where the holder of a commutation ticket, to be used only by the person to whom it is issued, allows another to use it, it may on presentation by another person, be taken up and forfeited, and that after a demand upon the person so presenting the ticket, for fare and a refusal by him to pay, the expulsion from the train is justifiable.

To the same effect are the following cases:

Toledo R. R. Co. vs. McDonough 53 Md. 289.
Townsend vs. N. Y. R. R. Co. 56 N. Y. 295.
Shelton vs. L. S. R. R. Co. 29 Ohio St. 214.
Logan vs H. & St. J. R. R. 67 Mo. 663.
Bradshaw vs. South Boston R. R. Co. 235 Mass. 407.
Houstan & Texas R. R. Co. vs. Ford 53 Tex. 364.
Louisville N. etc. R. R. vs. Harris 9 Lou. 180.

We therefore respectfully submit that the Court both on the law and evidence should have granted the motion of the plaintiff for a new trial, and the refusal to grant such motion should be reversed and the case sent back for a new trial.

All of which is respectfully submitted.

I. C. SLOAN,
B. DUNWIDDIE and
B. F. DUNWIDDIE,
Plaintiff's Attorneys.

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 330.

CATHERINE FISHBURN, PLAINTIFF IN ERROR,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

Brief of Defendant in Error.

JOHN W. CARY,
Attorney for Defendant in Error.

BURTON HANSON,
Of Counsel.

H. E. Rounds, Printer, Milwaukee.

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 330.

CATHERINE FISHBURN, PLAINTIFF IN ERROR,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, DEFENDANT IN ERROR.

Brief of Defendant in Error.

This is an action of damages for the alleged wrongful act of the defendant in error in ejecting the plaintiff in error from one of its passenger trains. Upon the trial in the court below, the verdict and judgment were in favor of the defendant in error.

There is no assignment of errors annexed to and returned with the writ of error in this case, as provided in section 997 of the Revised Statutes and subdivision one of rule eight of the rules of this court, and there is a general non-compliance with the provisions of the statute and the rules of this court in the preparation of the brief of counsel for the plaintiff in error.

Under the rule enunciated in *Benites vs. Hampton*, 123 U. S., 519, counsel is not entitled to be heard, and the writ of error should be dismissed.

STATEMENT OF CASE.

On the afternoon of the 24th day of July, 1884, the plaintiff in error took passage upon one of the passenger trains of the defendant in error at Pipestone, Minnesota, for the purpose of going to Edgerton, which was a few miles east of Pipestone. She had a ticket from Pipestone to Edgerton. Before reaching Edgerton she concluded to continue her journey to Chicago, on her way to her home, which was at Orangeville, in the state of Illinois, and thereupon asked the conductor of the train if he would wait for her at Edgerton to purchase a ticket to Chicago. The conductor told her that he would do so.

The plaintiff in error had a daughter who resided at Edgerton, with whom she had been visiting during the summer. When the train reached Edgerton the plaintiff's daughter was at the station, and the conductor, in pursuance of plaintiff's request to purchase a ticket for Chicago, told the station agent, Robert A. Smith, who was at that time at the front end of the train attending to the express matter, to get the plaintiff a ticket to Chicago, and thereupon the agent went into the ticket office, and the plaintiff and her daughter went with him to the ticket window for the purpose of getting a ticket.

The plaintiff and her daughter claim that the conductor went with them, and was present when the ticket was purchased, but the conductor denies this, claiming that because the agent was called away to sell a ticket at this time, he assisted in putting the baggage on the train, and that he was not in the ticket office with the plaintiff at any time. (Record, p. 54, fol. 95.)

The ticket agent made out the ticket by filling in its destination, tore it out of the book containing the tickets, stamped it and was holding it in his hand, when the plaintiff ha. ded him a twenty dollar bill. The price of the ticket was some thirteen dollars. The agent, with the twenty dollar bill and ticket in his hand, started to go to

the safe to get the necessary change for the purpose of returning it to the plaintiff, when the conductor, as the plaintiff and her daughter testified, called out: "All aboard!" Immediately the daughter said: "Hurry up, Mr. Smith, or my mother will get left." (Record, p. 31, fol. 59, and p. 38, fol. 70.)

The conductor says the train was at the station four or five minutes, (the usual length of time being about two minutes, Record, p. 60, fol. 105), and that he did not call "All aboard!" until he saw the plaintiff come out of the ticket office. (Record, p. 54, fol. 95.)

The agent returned the proper change to the plaintiff, and supposed that he had also given her the ticket until the next day, when it was found in the money drawer of the safe from which the change was taken, with the twenty dollar bill which he had received from the plaintiff. (Record, pp. 59, 60.)

The plaintiff put the change which she received from the agent into the pocket of a long duster which she was wearing, without looking to see whether she had her ticket, supposing all of the time, and until the ticket was found, that she had received it from the agent. Her daughter also supposed her mother had received it. In the haste and excitement of the moment she left her parasol at the ticket window, which the agent brought to her after she had got aboard the train. (Record, folios 58 and 59.)

As soon as the plaintiff had taken her seat in the car, and the train began to move, she took the change which the agent had given her from the pocket of her duster and put it into her purse, and then she thought, as she testified, "Where is my ticket?" She began to look for it, searched through all her pockets and her purse, but could not find it. Thinking that perhaps she had dropped it, she walked down the aisle of the car in search of it. Not finding it, she went back to her seat and made

further search for it, but did not find it. Just then the conductor came in the car to collect fares. What occurred between him and the plaintiff is in dispute.

She testified that she told him she was afraid she had lost her ticket, and that he said "You must get right off here then," and immediately put up his hand and pulled the bell-cord to stop the train; that she was shocked at this, for he said it in such an ugly manner; that the train began to slack up and came pretty near to a stand-still, and then commenced going faster, and that seemed to enrage him, and he again told her to get her baggage, at the same time he reached up and rang the bell again to stop the train; that she then sank down and said: "Well, I can't"; that the brakeman then came into the car and the conductor said to him, "Get this woman off here," and he then stepped into her seat and took her baggage and walked out with it. The train was not yet at a stand-still, and the conductor took her by the shoulder and urged her along, and when the train stopped shoved her out of the door, the brakeman helping her down, at the same time the conductor saying to her: "You can walk back;" that she had means to pay her fare but did not offer to do so, but would have been willing to have paid it, had the conductor given her time to do so; that while she was standing on the ground, and before the train started, some passengers who were riding in the car next to the one she had been in, among whom were the witnesses Pickett, Ask and Kingsbury, came to the door and asked her why she was off the train; that she replied she had lost her ticket; that the witness Pickett then said to her they would pay her way; that she does not remember the exact reply she made to Mr. Pickett, whether she said to him she would go back and hunt for her ticket, or go on; all that she remembers saying is that she had lost her ticket.

According to the testimony of Pickett, Ask, Kingsbury

and the conductor, the conductor replied to them that she did not want to go on, as she had lost her ticket, and wanted to go back and find it. (Record, pp. 43, 51 and 55.)

The train moved on, and then the plaintiff started back toward Edgerton, which was from a quarter to one-half a mile away.

The train had stopped at the east end of a trestle bridge, which was from 75 to 100 feet in length. The plaintiff walked over the bridge by stepping from tie to tie, and when she reached the end of it she saw her daughter, who was near the station, and then sat down alongside the track on her baggage and waited there until her daughter came, when they walked back to the station together. When they reached the station they called upon the station agent, and they all made search for the ticket. The station agent was sure that he delivered the ticket to the plaintiff, and the plaintiff says she thought he had given it to her, and a Mr. Weisbeck said she had her ticket in her hand when she stepped on the car platform. (Record, p. 39.)

The search was continued during the afternoon, but the ticket was not found. The next morning the agent had occasion to go to his safe for some change, and upon opening the money drawer and taking out the twenty dollar bill which he had received from the plaintiff the day before, he found the ticket under it. He immediately called upon the plaintiff and told her how he had found the ticket, and that she could use the ticket to go home that day, or if she chose, the price of it would be refunded to her. (Record, pp. 40 to 60.)

The testimony of the conductor is, that when he entered the car for the purpose of collecting fares, and as he came up to the plaintiff for her ticket, she appeared to be looking for something; that she said to him: "I can't find my ticket, I think I have lost it;" that he thereupon said: "We may find it on the floor." She then stepped

out of the seat into the aisle, and he looked for the ticket under the seat and under the cushion, and she looked for it, but did not find it; that she thereupon remarked: "It is lost; what will I do?" That he said: "If I was in your place, and had bought a ticket to Chicago, I would get off and go back and try to find it;" that very likely she would find it by going back; that if she did not want to do that, she could go on to Fulda, a station twenty-nine miles east of Edgerton, and buy another ticket from there to Chicago, and it should not cost her anything to go to Fulda; *that she replied that she would go back and find the ticket*, and that after this talk he pulled the bell-cord and stopped the train; that he and the brakeman assisted her off at a place where the ground was dry and where there was plenty of room for her to stand while the train moved by her; that he told her to remain standing there until the train pulled out of her way, when she could take the track and walk back to the station; that he did not take hold of her, or push her, or touch her, or order her to get off, nor use any loud or boisterous language, nor say to her: "Get your baggage and get off the train;" that she did not at any time request him to carry her further on the train, nor offer to pay her fare, nor request him to accept her fare from the passengers who offered to pay it, after she had left the train. (Record, pp. 54, 55.)

The conductor did not know the plaintiff, and had never seen her prior to this day. He denies that the plaintiff's daughter told him her mother was suffering from rheumatism, or that he had any knowledge whatever of her condition. (Record, fol. 98.)

The only witnesses who heard the conversation that occurred in the car between the plaintiff and the conductor were the brakeman, Loren Tenney—and he only heard the latter part of it, as he did not come into the car until the conductor was in the act of pulling the bell-cord,

(plaintiff's testimony, Record, top of p. 32)—and J. W. Thayer, who testified he heard the conductor say to the plaintiff that she had better stop and find her ticket if she had left it. (Record, pp. 62 and 73.)

The plaintiff's witnesses, Pickett, Ask and Kingsbury, whose testimony is found in the Record, pp. 42 to 52, did not hear any conversation between the plaintiff and the conductor excepting what occurred after the train stopped and the plaintiff was on the ground, and they testified that that they did not hear the conductor or the brakeman use any rude, ungentlemanly or abusive language to the plaintiff.

The defendant's witnesses, Coates and Mr. and Mrs. Thayer (Record, pp. 61 to 64), who were in the same car that the plaintiff was in, testified that they heard no loud or ungentlemanly language; that the conductor appeared to be calm, was not excited, used no undue haste, and that he did not at any time have hold of the plaintiff, and that he seemed to be gentlemanly in every respect.

A recovery is sought for upon the following grounds:

1. That the station agent made a mistake in not delivering the ticket to the plaintiff at the time she purchased it.

2. That the conductor expelled her from the car without giving her any opportunity to pay her fare.

After verdict for the defendant, the plaintiff made a motion to set it aside and grant a new trial, alleging as the reason therefor, that the court below erred in charging the jury.

It will be observed that the motion does not specify as one of the grounds why it should be granted; that there is no testimony to support the verdict, or that the verdict is against the evidence. (Record, pp. 76, 77, 78.)

The motion was denied, and judgment was entered upon the verdict in favor of the defendant.

The plaintiff brings the case into this court by writ of error to reverse the judgment.

ARGUMENT.

I.

The only error which can be said to be assigned is the ruling of the court below in denying plaintiff's motion to set aside the verdict and grant a new trial.

It has long been the established law in the courts of the United States that to grant or refuse a new trial rests in the sound discretion of the court to which the motion is addressed, and that the result cannot be made the subject of review upon a writ of error.

Newcombe vs. Wood, 97 U. S., 581.

In the brief of counsel for the plaintiff in error, at page 19, it is claimed that the verdict is contrary to the evidence, and for that reason it should be set aside.

There is no such assignment of error in the record, and the verdict was not asked to be set aside in the court below for the reason that it was unwarranted by the evidence. This question is not therefore properly before this court

Conceding, however, that the question is properly raised, there is abundant testimony in the record to support the verdict, and this court will not therefore disturb it.

II.

The court charged the jury as follows in respect to the mistake which the station agent made in not delivering the ticket to the plaintiff at the time she purchased it:

"There is nothing in the case to give rise to any suspicion that the agent acted improperly or dishonestly, or that he had any other idea than that he had delivered the ticket to her."

"It would seem that the evidence makes a clear case of mistake, a mutual mistake on the part of the plaintiff and the ticket agent, as to the fact of her not receiving the ticket."

Exception was taken to the foregoing charge, and the plaintiff in the motion for a new trial assigned this as one

of the reasons why the verdict should be set aside.

The charge was right under the testimony.

It should be borne in mind that the plaintiff came off the train, which was standing at the station, to purchase the ticket, and that what was attempted to be done for her by both the ticket agent and the conductor in getting her a ticket was done as a convenience to her, rather than duty which the defendant owed her.

The agent had duties to perform outside of the ticket office at the time of the departure of the train, but left these duties for the conductor to perform, that he might accommodate the plaintiff.

While it is the duty of a railroad company to keep its ticket office open up to the time fixed for the departure of trains, so that persons desiring to take passage upon them may purchase tickets, there is no duty to keep it open after the time at which trains are advertised to leave, or for passengers on its trains. The train was about four minutes late out of Edgerton. (Record, p. 54, fol. 95.) It is not to be presumed that passengers on a train desire to purchase tickets for the particular train upon which they are being carried.

It should also be borne in mind that the station agent was hurried both by the plaintiff and her daughter when he was in the act of getting the proper change, the plaintiff telling him to get her a ticket as quick as he could (Record, p. 36, fol. 68), and her daughter saying to him to hurry up or her mother would get left. (Record, p. 38, fol. 70.)

But conceding that the mistake was wholly with the agent, it was a mistake which can very properly be attributed to the acts of the plaintiff and her daughter in hurrying him while he was getting the ticket and making the change. The mistake cannot therefore be said to be an actionable mistake.

There can be no question but what the evidence makes

out a case of mutual mistake between the agent and the plaintiff. It was as much the duty of the plaintiff to see to it that she procured her ticket, as it was of the agent to deliver it to her. The duties are correlative.

The record shows that the agent supposed he had delivered the ticket to the plaintiff, and the plaintiff supposed she had received it but had lost it. Her daughter supposed the same thing.

In the case of *Weaver vs. Ry. Co.*, 3 Thompson & Cook N. Y. Supreme Court, 270, the plaintiff called for three tickets and paid for them, and received from the agent but two. The whistle had blown for the train to start, and the plaintiff got upon the train, and when called upon by the conductor for the tickets for himself and two others who were with him, found that he had lost one of the tickets. The court below charged the jury that if he paid for three tickets and received but two, the company was bound to transport him to his destination, and was not justified in ejecting him from the train. On appeal this was held to be error. The court said:

"If the plaintiff did in fact pay for three tickets, and the defendant's ticket agent failed to give him but two, it was doubtless a case of mutual mistake, in which the plaintiff was partly in fault, in that he did not see to it at the time that he obtained the tickets."

The counsel for the plaintiff in error in his brief insists that the law required the utmost diligence on the part of the agent in delivering the ticket to the plaintiff. No greater care was required on the part of the agent than on the part of the plaintiff. The extreme degree of care contended for is only required in respect to the *transportation* of passengers. In selling tickets there is no such extraordinary rule of diligence required, and it has been held that even where passengers have been injured in and about depots and platforms, that only the rule of ordinary care applies.

Thompson on Carriers, page 104.

The case of *Yorton vs. Railway Company* cited by counsel is not in point There the passenger asked the conductor of the train for a stop-over ticket, that he might leave the train at an intermediate station, and proceed to his destination on another train. The conductor by mistake gave him a trip check, good for that day and train only. The plaintiff, supposing that the conductor gave him the kind of a ticket he asked for, left the train. The next day he resumed his journey, and tendered the check which he had received the day before for his passage, but was told that the check was not good for that day or train, and upon refusing to pay his fare, he was ejected from the train. The court held that he might recover the damages which he suffered in being put off the train. Here the passenger received a ticket, and it may well be said that he had a right to suppose it was such a ticket as he had asked for. Had he left the train without any kind of a ticket, although he had asked for one and supposed he had it, when in fact he did not, then as between himself and the conductor the mistake would have been mutual.

Had the station agent delivered to the plaintiff a ticket, but not the kind of a ticket that she had asked for, and she had boarded the train supposing it was a proper ticket, the case would have been different from the one now presented. For while it is the duty of a person about to take passage upon a train to see that he has a ticket or some other evidence of his right to ride thereon, this duty may not require him to make a careful inspection of the ticket which he in fact receives, but he may rely somewhat on the belief that the ticket which he receives is the proper ticket.

The instruction to which exception is taken is but a statement of fact, which the uncontradicted testimony proves; for both the agent and the plaintiff supposed that the ticket which the plaintiff purchased was delivered to her. They both so testified.

The court did not instruct the jury that the mistake was mutual and therefore the plaintiff could not recover; but that if they believed from all the evidence in the case there was a mutual mistake made between the parties, and when the conductor came to the plaintiff to collect her fare she supposed she had lost the ticket, and after searching for it was unable to find it, then the conductor was under no obligation to carry her unless she paid her fare. (Record, p. 72, fol. 125.)

This was a fair submission of the question involved to the jury.

We insist therefore that there was no error in the charge of the court.

III.

The next error discussed in the brief of counsel is that portion of the judge's charge which relates to the advice which the conductor testified he gave the plaintiff to go back and search for her ticket. The following portions of the charge are excepted to:

"It is for the jury to say whether it would not have been perfectly reasonable and proper for the conductor to have given the advice he says he did, if the facts were as they supposed they were, that she had lost her ticket. But under the false impression as to the fact of her having lost her ticket, it will be for the jury to say whether, under all the circumstances, that would not have been the best thing for the woman to do."

The conductor testified that after he and the plaintiff had made search for the ticket she asked him what she should do, and that he advised her to go back and look for her ticket, or if she did not wish to do that, she could go on to Fulda and buy another ticket to Chicago. That she concluded to go back and look for her ticket, and he stopped the train and assisted her off.

Before giving these instructions the court read to the jury the testimony of both the plaintiff and the conductor as to what occurred in the car before the train stopped.

(Record, pp. 68 to 71.) In addition to the above instructions, the court also instructed the jury that if the conductor did not advise the plaintiff, as he testifies he did, and that she did not leave the train in pursuance of that advice, but was ordered and put off the train before she had time to look for her ticket or pay her fare, the defendant would be liable. (Record, pp. 73 and 74.)

Both the plaintiff and the conductor supposed that the ticket had been lost, and both might reasonably have supposed that upon search it could be found. It was therefore reasonable that the plaintiff should have asked for the conductor's advice, and that the conductor should have advised her in the manner testified to by him.

These instructions were therefore proper, for they fairly submitted to the jury the claims of both parties.

But it is claimed that it was negligence on the part of the conductor in stopping the train at the east end of the bridge and leaving the plaintiff where she would have to walk over the bridge in returning to the station, and it is argued that had the conductor backed the train to the left end of the bridge and let the plaintiff off there, her injuries would not have occurred.

It was but a short distance from the station to the place where the train stopped, and where the plaintiff left the train the ground was dry and there was plenty of room. The bridge was from seventy-five to one hundred feet in length, and, so for as the testimony shows, there was no more difficulty in walking over it than over any other portion of the railroad track between there and the station.

The plaintiff says that her health was impaired from nervous weakness and rheumatism, and that the conductor must have known this from a remark which her daughter made to him when the ticket was purchased.

The conductor was not acquainted with the plaintiff, and had never seen her prior to that day, and he denies

that he was in the ticket office at any time when the plaintiff and her daughter were there, or that the daughter told him that her mother was an invalid, or that he had any knowledge whatever that she was suffering from rheumatism or was in a nervous condition, as was claimed on the trial.

It should also be borne in mind that the conductor testified that he told the plaintiff, after she had sought his advice as to what she would do, that he would stop the train and she could go back and look for her ticket, and that he stopped the train and assisted her off because she preferred to go back and look for her ticket rather than to go on to Fulda and buy another ticket for Chicago. (Record, p. 54, fols. 95 and 96.)

The verdict being for the defendant, the jury must have accepted the testimony of the conductor as the truth and found that the place where the plaintiff voluntarily left the train was a proper place, considering her age, the condition of her health as she appeared to the conductor, and all the circumstances of the case.

IV.

The Court instructed the jury that the demand which the conductor made on the plaintiff for her ticket was a sufficient demand in the first instance for her fare; that if, after it was ascertained that the ticket could not be found, the conductor refused to allow her to pay her fare and forced her off the train without giving her a reasonable opportunity to do so, the defendant would be liable; that there was no evidence that the conductor formally demanded of the plaintiff her fare after it had been ascertained that the ticket could not be found, and that he would leave it to the jury to say, upon all the evidence, whether it showed that he forced her off the train without giving her an opportunity to pay her fare.

Counsel contends that this instruction is erroneous, and

that the conductor should have demanded fare of the plaintiff after it was discovered that the ticket had been lost and the plaintiff had sought his advice as to what she should do.

There is no dispute but what there was not only a reasonable time accorded to the plaintiff to search for her ticket, but that there was a reasonable opportunity given her, after she had searched for her ticket, in which to decide whether to go back and look for her ticket or go on to Fulda and buy another ticket and continue her journey.

The testimony of the plaintiff and other witnesses shows that considerable time was spent by the conductor and plaintiff in searching for the ticket. In fact, the complaint alleges this:

"And this plaintiff then searched for her ticket, and after making careful search found she did not have said ticket and so informed the said conductor." (Complaint, subdivision 4.)

If the jury believed the testimony of the conductor and the witness Thayer, as their verdict shows they did, it would have been superfluous for the conductor to have made a demand on the plaintiff for her fare after it was ascertained that the ticket could not be found; for she was given the choice of means, either to have the train stopped so that she might leave it and go back and look for her ticket, or remain on the train and buy another ticket at Fulda. And the jury must have found that although she had means to pay her fare, she concluded that having purchased the ticket, and supposing that she had lost it and could find it by returning, she would rather delay her journey for a day or two than to lose the price of her ticket. True, she testifies that she would have been willing to have paid her fare had the conductor demanded it, yet that does not necessarily prove that she did not seek the advice of the conductor and voluntarily leave the

train in pursuance of the advice which the conductor says he gave her.

The jury must have found that she left the train voluntarily and with a full understanding of her right to proceed thereon if she desired, by paying her fare. That she was given a reasonable opportunity to decide whether to go back and hunt for her ticket or go on to Fulda and purchase another ticket for Chicago. That he assisted her off the train at a proper place and treated her in a polite and gentlemanly manner.

We submit, therefore, that the record shows no reversible error, and that none is properly assigned; that the instructions of the Court covered and set forth the conflicting claims of both parties, and were as favorable to the plaintiff as the testimony would warrant.

JOHN W. CARY,
Attorney for Defendant in Error.

BURTON HANSON,
Of Counsel.